

# Querying *Lawrence*

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*In 2003, the Supreme Court in the landmark decision Lawrence v. Texas found a Texas law, banning homosexual, but not heterosexual, sodomy to be unconstitutional. Thus, Lawrence ended the Bowers era in which morality was deemed to be a justification for discrimination against gays and lesbians. While the decision did bring to United States Constitutional analysis the radical idea that gays and lesbians are people too, it stopped short of addressing the real problem the case presents—the existence of a second-class citizenry. This Article examines the Lawrence decision in light of both the international, regional, and foreign jurisprudence and the critical theoretical frameworks. In doing so, it provides a more complete rendition of the Lawrence facts than appears in the Supreme Court opinion and offers further insight into the litigants' life histories. This critical evaluation leads to the conclusion that the good in Lawrence be celebrated, but with caution, in order to move forward in a pluralistic, accepting, antisubordination model.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1152
II.	LEGAL BACKGROUND .....	1153
	A. Domestic.....	1155
	1. Liberty and Privacy.....	1155
	2. Equal Protection.....	1166
	B. Transnational.....	1173
	1. International .....	1173
	2. European.....	1178
	3. Foreign Cases.....	1197
	C. Comparative Observations.....	1207
III.	THE CASE—A QUESTION OF COHERENCE.....	1212
	A. The Majority Decision.....	1213
	1. Justice Kennedy and Liberty.....	1213
	2. Justice O'Connor and Equality.....	1218
	3. Critical Observations.....	1219

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B.	<i>Scalia's Dissent</i>	
1.	<i>The Substance</i> .....	1220
2.	<i>Critical Observations</i> .....	1224
IV.	QUERYING LAWRENCE—A SEARCH FOR COHERENCE .....	1228
A.	<i>Critical Theoretical Frameworks</i> .....	1229
B.	<i>Critical Interrogations</i> .....	1234
1.	<i>Realities: A Fuller Account of the Facts</i> .....	1234
2.	<i>Privacy</i> .....	1240
3.	<i>Equality</i> .....	1244
C.	<i>Empire</i> .....	1254
V.	CONCLUSION .....	1261

## I. INTRODUCTION

The case of *Lawrence v. Texas*,<sup>1</sup> decided on June 26, 2003, is a landmark decision that is noteworthy for more than just its outcome. It is a ground-breaking, culture-shifting case that turns on minimal facts about the people and circumstances central to the ruling. Reflecting the hyper-polarized blue/red political divide of the United States as a nation, the decision represents either paradise or perdition, progress or deterioration, salvation or transgression.

In *Lawrence*, two men were arrested for, and criminally charged with engaging in same-sex sexual contact in one of their homes—activity prohibited by a Texas statute proscribing homosexual, but not heterosexual, sodomy.<sup>2</sup> The criminal court denied motions to quash the complaints, so they entered pleas of nolo contendere and were convicted and fined.<sup>3</sup> Although a court of appeals panel found the statute violated the state constitution, in a rehearing en banc, the Texas court, using a rational basis analysis, upheld the statute's constitutionality under both the state and federal equal protection and privacy provisions, ruling that it was within the purview of the State of Texas to view same-sex sodomy, but not opposite-sex sodomy, as immoral.<sup>4</sup>

The two men challenged the constitutional validity of the Texas law as constituting an invasion of their right to privacy. In addition, because the statute criminalized only same-sex contact, the men challenged the statute on equal protection grounds.<sup>5</sup> Significantly, the State of Texas claimed that the popular view on the immorality and abhorrence of same-sex sodomy provided rational grounding for the law.<sup>6</sup> Moreover, given the moral disapprobation of the conduct,

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>2</sup> *Id.* at 563.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 562–63; see also *infra* Part III.

<sup>5</sup> See *Lawrence*, 539 U.S. at 563–64.

<sup>6</sup> *Id.* at 577–78.

the State claimed the men could not assert same-sex sodomy as a fundamental right because such rights must be rooted in the nation's history and traditions.<sup>7</sup> Thus, Texas asserted that the statute rationally served to protect the legitimate goals of implementing public morality and furthering family values. The Supreme Court, in a 6–3 decision, disagreed with Texas.<sup>8</sup>

This Article explores *Lawrence* in the context not only of relevant domestic jurisprudence, but also of pertinent transnational jurisprudence. Part II examines the legal context of the *Lawrence* decision—Part II.A, *Domestic*, presents the domestic legal developments; Part II.B, *Transnational*, sets forth the transnational legal context, discussing decisions of international, regional, and foreign courts, as well as several relevant European administrative measures. Part III, after setting out the Court's statement of the *Lawrence* facts, presents and analyzes the *Lawrence* decision, including Justice Kennedy's majority opinion, Justice O'Connor's concurrence, and Justice Scalia's dissent. Finally, Part IV presents a critical analysis of *Lawrence* in three sections. Part IV.A, entitled *Critical Theoretical Frameworks*, briefly sets out critical theoretical paradigms that are useful in interrogating *Lawrence*. Part IV.B, *Critical Interrogations*, provides a more complete version of the events that led to the case, as well as additional information about the litigants. This section utilizes critical theory to analyze the privacy and equality components of the decision. Part IV.C, *Empire*, engages concepts of empire to evaluate the decision and explore its consequences. The conclusion, Part V, suggests that *Lawrence* is a good decision as far as it goes, but one that is plagued by the schisms it leaves unanswered. The conclusion urges that we celebrate the good in *Lawrence*, but be cautious about its potential deficits in order to move forward in providing all people full dignity and respect in a pluralistic, accepting, antisubordination world.

## II. LEGAL BACKGROUND

The concepts of equal protection, privacy, and liberty are not solely the purview of U.S. law; they also have international significance and protection. In the United States, the Fifth and Fourteenth Amendments to the Constitution expressly protect the liberty interest.<sup>9</sup> International and regional documents, specifically the Universal Declaration of Human Rights<sup>10</sup> (Universal

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<sup>7</sup> See *id.* at 582–83 (O'Connor, J., concurring).

<sup>8</sup> *Lawrence*, 539 U.S. at 561.

<sup>9</sup> U.S. CONST. amend. V (providing that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV, § 1 (prohibiting any state from “depriv[ing] any person of life, liberty, or property, without due process of law”).

<sup>10</sup> *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

Declaration), the International Covenant on Civil and Political Rights<sup>11</sup> (ICCPR), and the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>12</sup> (European Convention), also expressly protect the right to liberty.<sup>13</sup>

Similarly, international and regional laws, as well as U.S. legal norms, provide for the equal protection of the laws. The Fourteenth Amendment to the U.S. Constitution specifically provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>14</sup> Although the Fifth Amendment to the U.S. Constitution does not have a similar Equal Protection Clause, the Supreme Court has construed the Fifth Amendment’s Due Process Clause to include “an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”<sup>15</sup> In the international realm, the Universal Declaration, the ICCPR, and the European Convention all have express protections for equal protection of the law.<sup>16</sup>

Finally, while the right of privacy is not an expressly enumerated right in the U.S. Constitution, case law has read such a right into the Due Process Clause.<sup>17</sup>

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<sup>11</sup> *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976 [hereinafter *ICCPR*].

<sup>12</sup> *European Convention for Protection of Human Rights and Fundamental Freedoms*, entered into force Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter *European Convention*].

<sup>13</sup> See *Universal Declaration*, *supra* note 10, art. 3; *ICCPR*, *supra* note 11, art. 9; *European Convention*, *supra* note 12, art. 5 (“Everyone has the right to liberty and security of person.”).

<sup>14</sup> U.S. CONST. amend. XIV, § 1.

<sup>15</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>16</sup> See *Universal Declaration*, *supra* note 10, art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); *id.* art. 2 (listing specifically, but not exclusively, grounds upon which discrimination is proscribed, providing “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); *ICCPR*, *supra* note 12, art. 2 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *id.* art. 14 (“All persons shall be equal before the courts and tribunals.”); *id.* art. 26 (“All persons are equal before the law and entitled without any discrimination to the equal protection of the law.”); *European Convention*, *supra* note 11, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

<sup>17</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965). The Court provided that

Indeed, in expressing and developing a constitutional privacy right, Justice Douglas concluded that numerous Amendments “have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>18</sup> International documents, however, contain express protections of the right to privacy.<sup>19</sup> The following sections provide the domestic and international legal context in which these rights have been developed as pertinent to *Lawrence*.

## A. Domestic

### 1. Liberty and Privacy

Both the Fifth and Fourteenth Amendments to the U.S. Constitution protect persons from being deprived of “liberty . . . without due process of law”<sup>20</sup>—protections that reach both economic and noneconomic liberties. In the days

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[v]arious guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

*Id.* at 484. Further the Court held

[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Id.* at 486.

<sup>18</sup> *Id.* at 484. The Court also found that the right of marital privacy fell within such penumbras. *Id.* at 485.

<sup>19</sup> *Universal Declaration*, *supra* note 10, art. 12 (“No one shall be subjected to arbitrary interference with his privacy. . . .”); *ICCPR*, *supra* note 11, art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy . . . .”); European Convention, *supra* note 12, art. 8 (“Everyone has the right to respect for his private and family life. . . .”). Significantly, while in U.S. law the right to marriage is penumbral, in the international realm it is enumerated. See *Universal Declaration*, *supra* note 10, art. 16 (“Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family.”); *ICCPR*, *supra* note 11, art. 23 (“The right of men and women of marriageable age to marry and to found a family shall be recognized.”); European Convention, *supra* note 12, art. 12 (“Men and women of marriageable age have the right to marry and to found a family . . . .”).

<sup>20</sup> U.S. CONST. amend. V, XIV.

following the Fourteenth Amendment's ratification, the Supreme Court interpreted substantive due process narrowly and rejected challenges to state laws.<sup>21</sup> Later, state laws that allegedly interfered with property or economic liberty were invalidated.<sup>22</sup> In *Lochner v. New York*,<sup>23</sup> the Court identified an individual's right to sell his or her labor as encompassed in the liberty interest and found limitations on the number of hours per day or per week that bakers could work an "unreasonable, unnecessary and arbitrary interference" with an individual's contract right.<sup>24</sup>

After the Great Depression, the *Lochner* approach softened, ironically based upon the Court's recognition in *Lochner* that it is within the legitimate purview of government to protect the health and safety of employees who, based on their intelligence, capacity, or type of employment, were unable to protect themselves.<sup>25</sup> Using health and safety rationales, the Court upheld New York's designation of a minimum price for the sale of milk,<sup>26</sup> and a state law that set minimum wages for women and children.<sup>27</sup>

In two post-*Lochner* cases, the Court noted the breadth of noneconomic liberty interests that are constitutionally protected. In *Meyer v. Nebraska*, the Court declared unconstitutional a law that criminalized the teaching of foreign languages to students before they reached the eighth grade.<sup>28</sup> The Court provided that while no specific listing of the interests subsumed under "liberty" exists, liberty embraces a wide range of rights<sup>29</sup> linked to our humanity, and states

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<sup>21</sup> See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (holding a Louisiana law that provided monopoly on butchering in New Orleans was not violative of due process).

<sup>22</sup> See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (holding that the liberty clause protects the freedom to enter into contracts).

<sup>23</sup> *Lochner v. New York*, 198 U.S. 45 (1905). This case became the namesake for the era—The *Lochner* Era.

<sup>24</sup> *Id.* at 56 (prohibiting interference "with the right of the individual to . . . enter into those contracts in relation to labor which may seem to him appropriate or necessary"). Significantly, this decision had a strong dissent from Justice Holmes, who protested that "a constitution is not intended to embody a particular economic theory." *Id.* at 75 (Holmes, J., dissenting).

<sup>25</sup> See *Lochner*, 198 U.S. at 54–57; see also ALLAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 62–63 (2004).

<sup>26</sup> *Nebbia v. New York*, 291 U.S. 502, 538 (1934) (providing that "the court may hold views inconsistent with the wisdom of the law, [but] it may not be annulled unless palpably in excess of legislative power").

<sup>27</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937). The Court ruled that a "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular." *Id.*

<sup>28</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

<sup>29</sup> *Id.* at 399. The Court held that:

cannot arbitrarily deny these rights.<sup>30</sup>

Two years after *Meyer*, in *Pierce v. Society of Sisters*,<sup>31</sup> the Court again protected noneconomic liberties. It overturned an Oregon statute that required parents to enroll children over the age of eight in a public school until the child reached age sixteen, finding that requiring public instruction had no reasonable relation to state aims.<sup>32</sup>

After *Meyer* and *Pierce*, the Court in *United States v. Carolene Products Co.*,<sup>33</sup> articulated the rational basis test to ascertain whether a limitation on an economic interest violates substantive due process.<sup>34</sup> Significantly, in *Carolene Products*' famous footnote 4,<sup>35</sup> the Court presented the possibility that economic

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while this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.*

<sup>30</sup> *Id.* at 399–400 (explaining that “liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect”).

<sup>31</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>32</sup> *Id.* at 534–35. The Court ruled:

Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Id.* (citation omitted).

<sup>33</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>34</sup> *Id.* at 152. The Court established that

the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.

*Id.* The Court also noted that legislative judgment is to be supported if “any state of facts either known or which could reasonably be assumed affords support for it.” *Id.* at 154.

<sup>35</sup> *Id.* at 153 n.4 (citations omitted).

and personal liberty interests—enumerated or not—might be subject to a different standard of review.<sup>36</sup> Still today, the Court applies the rational basis standard for cases pertaining to economic interests.<sup>37</sup> But the *Carolene Products* Court specifically suggested a more exacting standard of review with respect to due process cases involving personal liberties. Justice Stone delineated the three now well-recognized instances that warrant a higher degree of scrutiny by the Court: when the regulation (1) runs afoul of an enumerated constitutional prohibition, (2) restricts political processes and interferes with democracy, or (3) prejudicially or discriminately targets racial, religious, national—“discrete and insular”—minorities.<sup>38</sup> Especially because it cites both *Meyer* and *Pierce* as instances where more rigorous judicial review might be appropriate, the Court in *Carolene Products* implicitly seems to suggest that rigorous judicial review is appropriate when it considers intrusions into at least certain noneconomic liberties.

Following *Carolene Products*, laws concerning unenumerated liberty interests were regularly upheld using the rational basis test. A noteworthy exception is the 1942 case of *Skinner v. Oklahoma*,<sup>39</sup> in which the Court addressed the validity of an Oklahoma statute that permitted sterilization of individuals with two or more felony convictions involving moral turpitude. The Court found that marriage and procreation were fundamental rights and that the sterilization law was an unconstitutional denial of equality to a “group[] or type[] of individual[]” that effected a deprivation of a “basic liberty.”<sup>40</sup> The Court’s

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<sup>36</sup> *Id.* at 152–53.

<sup>37</sup> See e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (finding that the financial burden being placed on dairy farmers in Minnesota to comply with recent legislation requiring milk be sold in “refillable bottles or plastic pouches” and not in “throwaway plastic milk bottles” was, under an Equal Protection Claim, subject to the familiar “rational basis” test. *Id.* at 461, 467.

<sup>38</sup> *Carolene Products*, 304 U.S. at 153 n.4. Specifically, the Court stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious [citing *Pierce v. Society of Sisters*], or national [citing *Meyer v. Nebraska*], . . . or racial minorities. . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

<sup>39</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>40</sup> *Id.* at 541. Specifically, the Court stated:



language and its use of heightened scrutiny resonated in later cases involving personal liberties.

Two years later, in *Prince v. Massachusetts*,<sup>41</sup> the Court, citing *Meyer* and *Pierce*, recognized the right of autonomy in families, allowing parents certain control in the upbringing of their children; but upheld the application of child labor laws.<sup>42</sup> The Court concluded that the state, active in its role to protect children, could act in the public interest and limit what parents could either permit or mandate their children do, even if such parental mandates were in the name of religion.<sup>43</sup>

After *Carolene Products*, substantive due process challenges to legislation pertaining to property or economic interests waned. States could easily satisfy the rational basis test with respect to such legislation. However, consistent with footnote 4 in *Carolene Products*, in a line cases beginning in 1965 with *Griswold v. Connecticut*,<sup>44</sup> the Court applied substantive due process using a heightened

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[T]he instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. *He is forever deprived of a basic liberty.* We mention these matters not to reexamine the scope of the police power of the States. We avert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

*Id.* (emphasis added). It is noteworthy that although this case was decided under the Equal Protection Clause rather than the Due Process Clause, the Court does note that the law is effecting the deprivation of a liberty. *Id.* at 538, 541.

<sup>41</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>42</sup> *Id.* at 166. In *Prince*, the Court upheld a prohibition against a nine-year-old girl's distributing magazines on the street for Jehovah Witnesses despite the distribution being at her parents' behest and with their approval and consent. However, the Court recognized that there exists a "private realm of family life which the state cannot enter." *Id.*

<sup>43</sup> *Id.* Specifically, the Court found:

[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

*Id.* (citations and footnote omitted).

<sup>44</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

standard of review to protect personal liberties. In *Griswold*, the Court invalidated a Connecticut state statute that prohibited the use of contraceptives and punished their distribution with a fine, imprisonment, or both.<sup>45</sup> The Court, acknowledging the economic liberty/personal liberty dichotomy,<sup>46</sup> protected the marital relationship by recognizing that the historical interpretation of the Bill of Rights creates zones of privacy that do not expressly exist in the text.<sup>47</sup> Consistent with its previous decisions finding an unenumerated right of privacy grounded in the First,<sup>48</sup> Third, Fourth, Fifth, and Ninth Amendments,<sup>49</sup> the Court found an unenumerated right of “privacy” in *Griswold*. Accordingly, the Court granted the right to privacy broad constitutional grounding, confirming it as a penumbra older than the Bill of Rights.<sup>50</sup> The only way to enforce the law, the Court stated, would be to invade the houses of married couples and perform a search of the bedrooms, an “idea . . . repulsive to the notions of privacy surrounding the marriage

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<sup>45</sup> *Id.* at 480–86.

<sup>46</sup> *Id.* at 482 (providing that the Court “do[es] not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions[; the Connecticut] law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation”). This application of the substantive due process right, however, was expressly noted by the Court to be for personal liberties, “not commercial or social projects.” *Id.* at 486.

<sup>47</sup> *Id.* at 484. For the Court’s holding in *Griswold* see *supra* note 17.

<sup>48</sup> *Griswold*, 381 U.S. at 482. Specifically, the Court concluded:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in the school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

*Id.*

<sup>49</sup> *Id.* at 484; see also *supra* note 17.

<sup>50</sup> *Griswold*, 381 U.S. at 484 (noting that the constitutional provisions “have penumbras, formed by emanations from those guarantees that help give them life and substance”). Significantly, Justice Harlan, in his concurrence, rather than relying on Justice Douglas’s penumbras, found the right of marital privacy in the express liberty protection provided by the Due Process Clause of the Fourteenth Amendment, noting that marital privacy is “‘implicit in the concept of ordered liberty.’” *Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). In addition, three of the *Griswold* majority justices agreed with Justice Harlan’s grounding of the marital privacy right in the liberty provision of the Fourteenth Amendment and linked it to the Ninth Amendment’s provision that enumerated rights do not signify or destroy other rights “retained by the people.” *Id.* at 484; see also *id.* at 499 (presenting Justice Goldberg’s conclusion that “the right of privacy in the marital relation is . . . a personal right ‘retained by the people’ within the meaning of the Ninth Amendment” and thus a “fundamental” personal liberty “protected by the Fourteenth Amendment from infringement by the States”).

relationship.”<sup>51</sup>

Two years after *Griswold*, in *Loving v. Virginia*,<sup>52</sup> the Court considered a challenge to a Virginia law that forbade interracial marriages. The Court relied on the Equal Protection Clause of the Fourteenth Amendment to invalidate the law, finding that it had no *raison d'être* other than to discriminate.<sup>53</sup> However, in specifically stating that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”<sup>54</sup> the Court also addressed a liberty interest. It concluded that antiscegenation laws “deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”<sup>55</sup>

Since *Griswold*, this unenumerated constitutional right to privacy has been extended by the Court to apply both beyond the marital context and to topics other than birth control. For example, in *Eisenstadt v. Baird*,<sup>56</sup> a case decided under the Equal Protection Clause, the Court invalidated a Massachusetts statute prohibiting the distribution of contraception to anyone who was not married, unless the distribution was for the prevention of disease. The Court observed that when the state places people into different categories, the classifications “‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”<sup>57</sup> Significantly, adding a privacy dimension to the case, the Court emphasized a person’s right to be free from government interference.<sup>58</sup>

One year after *Eisenstadt*, the Court decided *Roe v. Wade*.<sup>59</sup> The Court relied on the *Griswold* line of privacy cases,<sup>60</sup> in concluding that the right to privacy

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<sup>51</sup> *Id.* at 486.

<sup>52</sup> *Loving v. Virginia*, 388 U.S. 1 (1967). The law even prohibited a couple from leaving the state for the purpose of marrying if they intended to return to the state and live together as husband and wife. *Id.* at 4.

<sup>53</sup> *Id.* at 12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>57</sup> *Id.* at 447 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

<sup>58</sup> *Id.* at 453 (noting that “[a]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy”) (quoting *Stanley v. Georgia*, 394 U.S. 557, 569 (1969)).

<sup>59</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>60</sup> *Id.* at 152 (concluding that precedents “make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in the[] guarantee of personal privacy”) (citation omitted). The Court reiterated its finding that personal privacy as well as areas and zones of privacy are grounded in the First, Fourth, and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; and in the

was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>61</sup> According to the Court, this right of privacy is not absolute and at some stage the state's interest in health and public safety may constitutionally allow regulatory action.<sup>62</sup>

Extending its protection of personal liberty in *Carey v. Population Services International*,<sup>63</sup> the Court ruled that minors—married or unmarried—also have the fundamental liberty interest to use contraceptives. The Court plainly stated that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."<sup>64</sup> Quoting *Eisenstadt*, the Court noted that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to [have] a child."<sup>65</sup>

Four years after *Roe*, and only ten years after the Court had found the Virginia antimiscegenation statutes unconstitutional in *Loving*, the Court revisited the constitutional significance of marriage<sup>66</sup> in *Zablocki v. Redhail*.<sup>67</sup> Citing its *Griswold* language that marriage is part of a right of privacy older than the Bill of

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concept of liberty. *Id.*

<sup>61</sup> *Id.* at 153. In *Roe*, the Court analyzed statutes that criminalized abortion and reached its decision notwithstanding the reality that the statutes were more focused on the people who performed the abortions than on the parties who obtained them.

<sup>62</sup> *Id.* at 153–54. The Court held:

The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulations of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.

*Id.* The Court supported the statement of the non-absolute nature of the privacy right by citing to its rulings on vaccinations and sterilization. Thus, it proceeded to note that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

<sup>63</sup> *Carey v. Population Services International*, 431 U.S. 678, 693 (1977) (invalidating a New York statute that made it a crime to sell or distribute contraceptives to minors under the age of sixteen, the Court concluded that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults").

<sup>64</sup> *Id.* at 685.

<sup>65</sup> *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

<sup>66</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (ruling that "recent decisions have established that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause").

<sup>67</sup> *Id.* at 374 (analyzing the validity of a Wisconsin law that imposed restrictions on the issuance of marriage licenses to parents who have not complied with child support orders).

Rights,<sup>68</sup> the Court confirmed and firmly grounded the right to marry as a fundamental right.<sup>69</sup> Any laws that interfere with that decision impose an undue burden on the right to marry,<sup>70</sup> the Court reasoned, and therefore must be analyzed under a strict scrutiny standard.<sup>71</sup>

More recently, in *Planned Parenthood v. Casey*,<sup>72</sup> the Court analyzed the constitutional validity of a Pennsylvania statute that placed limits on abortion.<sup>73</sup> While ruling that a woman's decision to obtain an abortion is a liberty interest protected against state interference, "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment . . . this Court's decisions [have] represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."<sup>74</sup> The *Casey* decision abandoned *Roe*'s complex trimester structure and Justices O'Connor, Kennedy, and Souter articulated a new test—the "undue burden" test, which supplanted the strict scrutiny test, generally applied in fundamental rights cases<sup>75</sup>—to review the validity of the law. This new test renders automatically invalid an undue burden on a woman's liberty interest, but effectively makes it easier for the government to regulate abortion. A law imposes an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>76</sup> While the purpose strand of the undue burden test is

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<sup>68</sup> *Id.* at 384.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 387.

<sup>71</sup> *Id.* at 383 (requiring "critical examination" of state interests in support of the classification); *id.* at 388 (indicating critical examination is required "when a statutory classification" is involved). *But see id.* at 407 (Rehnquist, J., dissenting) (noting the concurrence had applied an "intermediate" standard of review and advocating the "rational basis" test).

<sup>72</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>73</sup> *Id.* at 844.

<sup>74</sup> *Id.* at 849–50 (citation omitted).

<sup>75</sup> The strict scrutiny test requires that if a law impinges or unduly burdens a fundamental liberty it will only be upheld if it is the least intrusive means of attaining a compelling state interest. *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960) (finding Arkansas statute requiring, as condition of employment as educator, annual filing of association with organizations unconstitutional as infringement on right to association, which went far beyond the state's legitimate right to inquire into the fitness and competency of its educators). "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488 (footnote omitted).

<sup>76</sup> *Casey*, 505 U.S. at 878.

satisfied if the law is intended to interfere with a woman's freedom of choice,<sup>77</sup> it is not violative of constitutional rights if the state seeks "to persuade [the woman] . . . to choose childbirth over abortion."<sup>78</sup> Consequently, a state is permitted to "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest."<sup>79</sup> Indeed, it appears that under this standard a government may pass laws that effectively interfere with a woman's ability to obtain an abortion, so long as those laws do not "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."<sup>80</sup> The Court concluded "[t]he fact that a law . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."<sup>81</sup>

One last noteworthy case in the liberty-privacy line is *Washington v. Glucksberg*.<sup>82</sup> Chief Justice Rehnquist, delivering the opinion of the Court, concluded that Washington State's prohibition on assisted suicide did not violate due process guarantees.<sup>83</sup> The Court determined that due process analysis requires a review of "our Nation's history, legal traditions, and practices."<sup>84</sup> Citing Canadian authority prohibiting assisted suicide,<sup>85</sup> the Court noted that "[i]n almost every State—indeed, in almost every [W]estern democracy—it is a crime to assist a suicide."<sup>86</sup> The Court observed that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."<sup>87</sup> Although the liberty interest is broad,<sup>88</sup> the Court was unwilling to expand the litany of protections,<sup>89</sup> and insisted on following its

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<sup>77</sup> *Id.* at 877.

<sup>78</sup> *Id.* at 878.

<sup>79</sup> *Id.* at 886.

<sup>80</sup> *Id.* at 879.

<sup>81</sup> *Id.* at 874.

<sup>82</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>83</sup> *Id.* at 735.

<sup>84</sup> *Id.* at 710 (citations omitted).

<sup>85</sup> *Id.* at 710 n.8 (listing numerous foreign states with provisions prohibiting assisted suicide, including Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

<sup>86</sup> *Id.* at 710.

<sup>87</sup> *Id.* at 711.

<sup>88</sup> *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). The Court noted that the liberty protected by the Due Process Clause "includes more than the absence of physical restraint. . . . [It] also provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . [including] the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* (citations omitted).

<sup>89</sup> *Id.* at 720. The Court stated its reluctance

to expand the concept of substantive due process because guideposts for responsible

“tradition of carefully formulating the interest at stake in substantive-due-process cases.”<sup>90</sup> Thus, the Court articulated the issue specifically and in positive terms.<sup>91</sup> It concluded that the “right” to commit suicide is not in the nation’s traditions as evidenced, in part, by states’ prohibitions on assisted suicide,<sup>92</sup> and, thus, the right is “not a fundamental liberty interest protected by the Due Process Clause.”<sup>93</sup>

*Glucksberg* elucidates the Court’s two-stage methodological approach to fundamental rights substantive due process analysis. First, the Court decides whether the right is of the type historically and traditionally protected under the liberty interest of the Due Process Clause.<sup>94</sup> The second stage determines whether the right rises to the level of being “fundamental” even if it is not specifically enumerated in the text of the Constitution.<sup>95</sup> A fundamental right triggers the strict scrutiny standard, which requires the government to have a compelling state interest to justify the infringement and to show that the regulation is necessary, defined as the least restrictive alternative available, to achieve the legitimate governmental objective.<sup>96</sup> Non-fundamental rights elicit only a rational basis review, which the government satisfies by establishing a legitimate purpose for the law and by showing that the regulation is a reasonable way to achieve its goal.<sup>97</sup>

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decisionmaking in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, [the Court], to a great extent, place[s] the matter outside the arena of public debate and legislative action. [The Court] must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

*Id.* (citations omitted).

<sup>90</sup> *Id.* at 722.

<sup>91</sup> *Id.* at 723 (articulating the issue as “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so”).

<sup>92</sup> *Id.* at 725.

<sup>93</sup> *Id.* at 728. The Court proceeded to analyze whether “Washington’s assisted-suicide ban [was] rationally related to legitimate government interests” and concluded that the rationality “requirement is unquestionably met here” as the prohibition “implicates a number of state interests.” *Id.*

<sup>94</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed’”) (citations omitted).

<sup>95</sup> *Id.* at 721 (asking for “a ‘careful description’ of the asserted fundamental liberty interest”).

<sup>96</sup> See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 762–68 (2d ed. 2002).

<sup>97</sup> See generally *id.* at 518–20; IDES & MAY, *supra* note 25, at 69–72.

## 2. Equal Protection

As presented in the liberty–privacy section above, the Due Process Clause of the Fifth and Fourteenth Amendments protects as unenumerated liberties the right to marry, marital privacy, contraception, abortion, and bodily integrity. The Equal Protection Clause of the Fourteenth Amendment, as well as the equal protection component that has been read into the Fifth Amendment Due Process Clause,<sup>98</sup> also protect many of these rights. In fact, the Court has invalidated regulations restricting access to contraceptives<sup>99</sup> and law impinging on the right to marry,<sup>100</sup> both as equal protection and due process privacy violations. This section will briefly scrutinize the equal protection jurisprudence of the Court in order to permit the reader to contextualize the line of cases in terms of *Lawrence*.

One early noteworthy case is *Hernandez v. Texas*,<sup>101</sup> a case that preceded *Brown v. Board of Education*<sup>102</sup> by a mere two weeks. In *Hernandez*, the petitioner, indicted for murder by a grand jury, sought to quash the indictment and the jury panel alleging that “persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors.”<sup>103</sup> The Court concluded that exclusion based on race of peers from a jury effects a denial of equal protection.<sup>104</sup> The decision followed an antisubordination rationale: “Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in

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<sup>98</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>99</sup> See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 688–89 (declaring unconstitutional a law prohibiting providing contraceptives to those under age sixteen). Compare *Eisenstadt v. Baird*, 405 U.S. 438, 443 (holding that law forbidding distribution of contraceptives to unmarried persons violates equal protection) with *Griswold*, 381 U.S. 479, 485–86 (holding that Connecticut’s statute criminalizing use of contraceptives violated due process clause by interfering with right of privacy).

<sup>100</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (holding that antimiscegenation laws violate equal protection and are a denial of a liberty interest); see also *supra* notes 52–55 and accompanying text.

<sup>101</sup> *Hernandez v. Texas*, 347 U.S. 475 (1954).

<sup>102</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>103</sup> *Hernandez*, 347 U.S. at 476 (footnote omitted).

<sup>104</sup> See *id.* at 477 (stating that “it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers”). The Court noted that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Id.* at 478 n.4 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). See also *id.* at 479 (concluding that “[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment”).



securing equal treatment under the laws.”<sup>105</sup> The Court presciently observed that “community prejudices are not static, and from time to time other differences from the community norm [other than race and color] may define other groups which need the same protection.”<sup>106</sup> Finally, the Court recognized group-based discrimination and specifically noted that people of Mexican descent could be recognized as a separate class protected under the Fourteenth Amendment if they showed a community attitude that held them as inferior.<sup>107</sup>

Two weeks later, the *Brown v. Board of Education* Court, pursuant to the Equal Protection Clause of the Fourteenth Amendment, struck down laws in Delaware, Kansas, South Carolina, and Virginia that either required or permitted racial segregation of public schools.<sup>108</sup> The Court acknowledged that the Fourteenth Amendment declares the equality of blacks and whites<sup>109</sup> and protects groups from being relegated to an inferior position.<sup>110</sup> Thus, using “sameness” equality language and embracing the antisubordination message of *Hernandez*, the Court rejected school segregation<sup>111</sup> as an equal protection violation<sup>112</sup> flying in the face of nondiscrimination goals.<sup>113</sup>

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<sup>105</sup> *Id.* at 478.

<sup>106</sup> *Id.* This observation comports with the *Carolene Products* structure. See *supra* notes 27–31 and accompanying text.

<sup>107</sup> See *Hernandez*, 347 U.S. at 478–79.

<sup>108</sup> *Brown v. Board of Education* 347 U.S. 483 (1954).

<sup>109</sup> *Id.* at 490–91 n.5.

[T]he law in the States shall be the same for the black as for the white; . . . all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, . . . no discrimination shall be made against them by law because of their color[.]

*Id.* (quoting *The Slaughter-House Cases*, 83 U.S. 36, 67–72 (1873)).

<sup>110</sup> *Id.* The Court provided that the words of the Fourteenth Amendment:

contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

*Id.* (citation omitted).

<sup>111</sup> See *id.* at 494 (noting that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”) (citation omitted).

<sup>112</sup> See *id.* at 495 (preferring an equal protection analysis over a due process analysis). The Court concluded that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Id.*

<sup>113</sup> See *The Slaughter-House Cases*, 83 U.S. 36, 70 (1872). The Court noted the driving force behind the Fourteenth Amendment was the desire to prevent states from continuing to

Thus, both *Hernandez* and *Brown* can be understood in the context of the *Carolene Products* suggestion that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>114</sup> This antistatutory rationale can also be applied to *Loving*, in which the Court expressly noted that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>115</sup>

Flowing from *Brown*, and in the context of the *Carolene Products* heightened scrutiny idea, *Plyler v. Doe*<sup>116</sup> is an important case in equal protection jurisprudence. In *Plyler*, the Court, using the equal protection provisions of the Fourteenth Amendment, struck down a Texas law that denied public school access to children of undocumented individuals.<sup>117</sup> Articulating an antistatutory perspective of equal protection analysis, the Court expressly provided that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.”<sup>118</sup> For most state action, the Equal Protection Clause only requires that the state show that “the classification at issue bears some fair relationship to a legitimate public purpose.”<sup>119</sup> However, the Court has “treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’”<sup>120</sup> With respect to these suspect classes or fundamental rights, the state has “to demonstrate that its classification has been

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discriminate, through legislation adopted after the Civil War against recently emancipated slaves. The post Civil War laws negatively affected former slaves because they were

forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party.

*Id.* See also *id.* at 81 (observing that the Fourteenth Amendment sought to eliminate the “existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class” (emphasis added)).

<sup>114</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>115</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>116</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>117</sup> *Id.* at 217–23.

<sup>118</sup> *Id.* at 213.

<sup>119</sup> *Id.* at 216.

<sup>120</sup> *Id.* at 216–17 (footnotes omitted).

precisely tailored to serve a compelling governmental interest.”<sup>121</sup> However, some classifications do not fit into either of these categories because they are neither facially invidious nor sufficiently protected by minimal scrutiny.<sup>122</sup> In *Plyler*, Justice Blackmun, in his concurring opinion, emphasized the importance of education in applying an intermediate level rather than a rational basis level of scrutiny, providing that “denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.”<sup>123</sup>

Three equal protection cases are noteworthy in the context of the antisubordination message of discrimination targeted against “unpopular groups.” First, in *United States Department of Agriculture v. Moreno*,<sup>124</sup> the Court used rational basis review to examine the constitutionality of the Food Stamp Act of 1964 which “exclude[d] from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household.”<sup>125</sup> Although, as initially passed, the Act defined household as “a group of *related or non-related* individuals,”<sup>126</sup> in 1971 Congress redefined the term to include only groups of related people.<sup>127</sup> Several excluded groups challenged the relatedness requirement as an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth

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<sup>121</sup> *Id.* at 217.

<sup>122</sup> *Plyler v. Doe*, 457 U.S. 202, 217 (1982). More recently, the Court has shifted to an intermediate level of scrutiny for gender-based classifications. Compare *Reed v. Reed*, 404 U.S. 71, 76 (1971) (articulating the traditional rational basis standard for review of a gender discrimination claim; providing that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to that object of the legislation, so that all persons similarly circumstanced shall be treated alike’” (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))) with *Craig v. Boren*, 429 U.S. 190 (1976) (declaring unconstitutional an Oklahoma law that set different ages for boys (age twenty-one) and girls (age eighteen) to allow them to buy low alcohol beer, and setting the standard “[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”) and *United States v. Virginia*, 518 U.S. 515, 531–33 (1996) (utilizing intermediate scrutiny for gender-based classifications to declare unconstitutional the exclusion of women by the Virginia Military Institute, and setting the standard as requiring “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action[; t]he burden of justification is demanding and it rests entirely on the State”).

<sup>123</sup> *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring).

<sup>124</sup> *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

<sup>125</sup> *Id.* at 529.

<sup>126</sup> *Id.* at 530 (quoting The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964) (amended 1971)) (codified as amended at 7 U.S.C. §2012(e) (1971)).

<sup>127</sup> *Id.*

Amendment.<sup>128</sup>

The purported purpose of the Food Stamp Act was to safeguard the health and well-being of the nation's population, raise levels of nutrition in low income households, and alleviate hunger and malnutrition.<sup>129</sup> The Court concluded that "[t]he challenged statutory classification . . . is clearly irrelevant to the stated purposes of the Act."<sup>130</sup> The Court, quoting the district court, "recognized '[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.'"<sup>131</sup> Moreover, available legislative history "indicate[d] that [the] amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."<sup>132</sup> The Court concluded "that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>133</sup>

The next "unpopular group" case is *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>134</sup> in which the Court, applying only a rational basis standard, invalidated a city ordinance that required a special permit for the operation of a group home for mentally disabled people;<sup>135</sup> the City could not require a permit

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<sup>128</sup> *Id.* at 531.

<sup>129</sup> *Id.* at 533.

<sup>130</sup> *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>131</sup> *Id.* (alteration in original) (quoting *Moreno v. United States Dep't of Agric.*, 345 F. Supp. at 313).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The government originally argued that the classification could be justified as a means to foster morality, a contention that was rejected by the district court which stated that "'interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions.'" *Id.* at 535 n.7 (quoting *Moreno v. United States Dep't. of Agric.*, 345 F. Supp. 310, 314 (D.D.C. 1972)). The district court had cited to *Griswold* and *Eisenstadt* for the proposition that it was doubtful whether the legislation could infringe on rights of privacy and associational freedoms because of moral concerns. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). The government then proceeded to argue that the challenged classification could still be deemed to be rationally related to the legitimate government interest in minimizing fraud in the administration of the Food Stamp Program. *Id.* at 535. However, the Court noted that legislative limitation to related households did not constitute a rational means to deal with fraud concerns as the classification does not further the eradication of fraud and the related household limitation would eliminate many households from eligibility with the program. *Id.* at 535-36.

<sup>134</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>135</sup> *Id.* It is noteworthy that although the district court used rational basis review, the Court of Appeals for the First Circuit reversed, "determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under intermediate-level scrutiny." *Id.* at 437-38 (citing *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984)). The Supreme Court rejected this approach, however, concluding that "for

for the operation of a group home for the mentally disabled when other multiple dwelling facilities did not require such permits.<sup>136</sup> Although the City defended the permit requirement by suggesting that neighborhood homeowners disapproved of the facility and feared its residents,<sup>137</sup> the Court concluded that the regulation “rest[ed] on an irrational prejudice against the mentally retarded,”<sup>138</sup> and could not be constitutionally upheld.<sup>139</sup>

Finally, in the 1996 case of *Romer v. Evans*,<sup>140</sup> the Court found Colorado Amendment 2, which prohibited any government action (legislative, executive, or judicial) protecting gays, lesbians, and bisexuals from discrimination, was constitutionally invalid.<sup>141</sup> Justice Kennedy, echoing the sentiments of footnote 4 in *Carolene Products*,<sup>142</sup> said the state had no legitimate purpose in singling out a

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several reasons . . . the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.” See *id.* at 442.

<sup>136</sup> *Id.* at 447 (listing facilities that did not require permits, including “apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses”).

<sup>137</sup> *Id.* at 448 (noting “concern[] with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood”).

<sup>138</sup> *Id.* at 450.

<sup>139</sup> *Id.* at 448. The Court noted:

[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

*Id.* (citation omitted). The Court also rejected other reasons provided by the City. For example, with respect to the City’s concerns that the facility’s location across from a junior high school might subject the residents of the facility to harassment by students and that because it was in a flood plain there was a possibility of a flood, the Court noted that “denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation.” *Id.* at 449. Similarly, the City’s concern about the size of the home and the number of people that would occupy the home was not being applied to other similar multiple dwelling facilities. Additionally, concerns about congestion, fire hazards, serenity of neighborhood, and avoidance of danger to other residents were dismissed as not meeting the rationality test given that other facilities with similar impacts were not required to have special permits. *Id.* at 449–50.

<sup>140</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>141</sup> *Id.* at 623.

<sup>142</sup> See *supra* notes 33–38 and accompanying text.

group<sup>143</sup> and forbidding them from using the political process.<sup>144</sup> Invoking antistatutory principles,<sup>145</sup> and using an equal protection analysis,<sup>146</sup> the Court stated that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."<sup>147</sup> Justice Kennedy observed that "[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment denies homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."<sup>148</sup>

Thus, equal protection analysis, like substantive due process analysis, allows tiers of protections of rights depending on the nature of the right or the classification of the person. Strict scrutiny is applied to fundamental rights and suspect classes, whereas a rational basis of review is applied to social and economic groupings.<sup>149</sup> Notably, in all cases, the Court has protected "unpopular groups," from hippies to the mentally challenged to "gays, lesbians and bisexuals," against legislation that is grounded on animus towards the group.

In sum, in the domestic realm, the Equal Protection and Due Process Clauses of the Constitution protect as fundamental the right of privacy, the right to associate, and the right to marry. Similarly, the Constitution protects unpopular groups from being the target of discrimination or prejudicial, irrational animus. Significantly, the Court at times uses an antistatutory principle to analyze the consequences and the validity of legislation against unpopular groups.

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<sup>143</sup> *Romer*, 517 U.S. at 632 (observing that "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation").

<sup>144</sup> *Id.* at 634.

<sup>145</sup> *Id.* at 633 (providing that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance").

<sup>146</sup> *Id.* The Court stated:

'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

*Id.* (citation omitted).

<sup>147</sup> *Id.* at 634.

<sup>148</sup> *Id.* at 627.

<sup>149</sup> In actuality, there is a third tier—an intermediate or quasi-suspect class tier—that has been used for gender classifications. See *supra* note 122. See generally CHEMERINSKY, *supra* note 96, at 721–28.

## B. Transnational

This section reviews relevant international, regional, and foreign jurisprudence that is of utility in the analysis of the *Lawrence* decision. The global focus is significant because, for issues of concern to gays and lesbians, the international and European regional systems can provide insights into an analytical framework appropriate for engaging such a complex theme. In this regard, the analytical processes utilized by the European Court may be of particular value. Similarly, decisions from Canada and South Africa elucidate the privacy and equality components of claims concerning sexual minorities.

### 1. International

In the international realm, the United Nations' Human Rights Committee (the Committee), the body that monitors member States' compliance with the ICCPR,<sup>150</sup> has addressed four pertinent cases. The first noteworthy decision of

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<sup>150</sup> ICCPR, *supra* note 11. The Committee is organized as follows:

1. There shall be established a Human Rights Committee . . . . It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

*Id.* art. 28. The ICCPR outlines the Committee's functions:

The Committee shall study the reports submitted by the States Parties [on the measures they have adopted which give effect to the rights recognized in the ICCPR and on the progress made in the enjoyment of those rights] to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

*Id.* art. 40(4). When a charge is made by a State Party that another State Party is not adhering to the Covenant, then

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

. . . .

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

the Committee was issued in the 1982 case of *Hertzberg v. Finland*.<sup>151</sup> The law in Finland prohibited public encouragement of "indecent behavior" between people of the same sex.<sup>152</sup> Pursuant to this law, regulations were promulgated against radio and television programs dealing with homosexuality. *Hertzberg* challenged the law and attendant regulations based on Article 19 of the ICCPR which provides that "[e]veryone shall have the right to freedom of expression."<sup>153</sup> Finland justified the law under Article 19(3)<sup>154</sup> which allows a state to impose restrictions on speech if they "are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."<sup>155</sup> Finland posited that the restrictions were reflective of contemporary morality.<sup>156</sup> The Committee held that "public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities."<sup>157</sup> Thus, speculating that there could be harmful effects on minors,<sup>158</sup> the Committee blindly accepted the decisions of the Finnish authorities that radio and television programs are inappropriate fora to discuss homosexuality because they encourage homosexual conduct.<sup>159</sup>

Significantly, an individual opinion appended to the Committee's view, while agreeing with the majority decision that the ICCPR could not be applied to private media, noted that Article 19 should allow free discussion of homosexuality.<sup>160</sup> In addition, the opinion noted that the notion of public morals

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(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.

....

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report . . .

*Id.* art. 41(1)(c)-(h).

<sup>151</sup> *Herzberg v. Finland*, Communication No. R.14/61, U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No 40, at 161, U.N. Doc. A/37/40 (1982) [hereinafter *Herzberg*].

<sup>152</sup> *Id.* ¶ 2.1.

<sup>153</sup> *ICCPR*, *supra* note 11, art. 19(2). The *Hertzberg* case was brought by radio and television programs that either had been censored or prosecuted under the Finnish law. *Hertzberg*, ¶ 2.1.

<sup>154</sup> *Hertzberg*, ¶ 6.3.

<sup>155</sup> *ICCPR*, *supra* note 11, art. 19(3).

<sup>156</sup> *Hertzberg*, ¶ 6.1.

<sup>157</sup> *Id.* ¶ 10.3. Without even requesting the transcripts for the censored programs, the Committee ruled in favor of Finland recognizing the "margin of discretion" granted states. *Id.* ¶¶ 10.2-3.

<sup>158</sup> *Id.* ¶ 10.4.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* app. at 166. Two Committee members "associated themselves with the individual



is relative and ever-changing and state regulations that restrict expression should not be allowed to “perpetuate prejudice or promote intolerance.”<sup>161</sup>

*Toonen v. Australia*,<sup>162</sup> decided over a decade later than *Hertzberg*, enjoyed a dramatically different outcome. Toonen, a gay rights activist from Tasmania, challenged two provisions of the Tasmanian Criminal Code which criminalized “all forms of sexual contact between consenting adult homosexual men in private.”<sup>163</sup> Although no person had been charged for several years, Toonen argued that “his private life and his liberty [were] threatened by the continued existence of [the] sections.”<sup>164</sup> He also argued that the existence of the sections “[had] created . . . conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.”<sup>165</sup> He claimed that the Criminal Code sections violate the ICCPR’s right to privacy<sup>166</sup> and nondiscrimination provisions.<sup>167</sup>

The Committee ruled in favor of Toonen holding that under Article 17 “moral issues are [not] exclusively a matter of domestic concern,”<sup>168</sup> and noting that other Australian states had repealed similar laws.<sup>169</sup> Moreover, regarding the nondiscrimination argument, rather than including sexual orientation under Article 26’s “other status” category, the Committee ruled that “the reference to

opinion.” *Id.* app. at 167.

<sup>161</sup> *Id.* app. at 166 (noting a need to protect freedom of expression with respect to minority views “including those that offend, shock, or disturb the majority”).

<sup>162</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. GAOR Hum. Rts. Comm., 50th Sess., Supp. No. 40, at 226, U.N. Doc. A/49/40 (1994) [hereinafter *Toonen*].

<sup>163</sup> *Id.* ¶ 2.1.

<sup>164</sup> *Id.* ¶ 2.3.

<sup>165</sup> *Id.* ¶ 2.4.

<sup>166</sup> *ICCPR*, *supra* note 11, art. 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

<sup>167</sup> *Id.* art. 2(1), 26. Article 2(1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* art. 2(1). Nondiscrimination is discussed again in Article 26, which provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* art. 26.

<sup>168</sup> *Toonen*, ¶ 8.6.

<sup>169</sup> *Id.*

'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."<sup>170</sup> The Committee on Economic, Social, and Cultural Rights (ECOSOC) has also interpreted the nondiscrimination wording in Article 2 to prohibit discrimination on the basis of sexual orientation.<sup>171</sup>

In *Joslin v. New Zealand*,<sup>172</sup> the Committee upheld the domestic courts' rejection of claims by two lesbian couples, both raising children, for access to marriage. The Committee interpreted Article 23(2)<sup>173</sup> language as a limitation of the right of men and women to marry each other.<sup>174</sup> Significantly, the language of Article 23(2) does not require this outcome. The section, after all, does not specifically articulate "the right of men and women of marriageable age to marry" *each other*. If not for the moral considerations, the Committee simply could have read the provision to mean that men and women are equally free to choose to marry whomever they want.

The Committee's most recent case, *Young v. Australia*,<sup>175</sup> is the first in which the Committee recognizes rights of same-sex couples. Young, the author of the communication, was in a same-sex relationship for thirty-eight years with a war veteran. When the partner died, Young applied for a pension under the Veteran's Entitlement Act (VEA) as a veteran's dependent<sup>176</sup> but the Repatriation Commission denied his application stating that he was not a dependent as defined by the Act.<sup>177</sup> In addition, Young was denied bereavement benefit because he was not considered a "member of a couple."<sup>178</sup>

Young filed a communication claiming that Australia's denial of pension benefits because he is of the same sex as his partner violated his right to equal

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<sup>170</sup> *Id.* ¶ 8.7.

<sup>171</sup> *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 14, U.N. ESCOR, 22d Sess., U.N. Doc. E/C.12/2000/4 (2000). ECOSOC is the U.N. treaty body that monitors compliance with the International Covenant on Economic, Social, and Cultural Rights.

<sup>172</sup> *Joslin v. New Zealand*, Communication 902/1999, U.N. GAOR Hum. Rts. Comm., 75th Sess., Supp. No. 40, at 214, U.N. Doc. A/57/40 (2002) [hereinafter *Joslin*].

<sup>173</sup> *ICCPR*, *supra* note 11, art. 23(2) (providing "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized").

<sup>174</sup> *Joslin*, ¶ 8.2.

<sup>175</sup> *Young v. Australia*, Communication No. 941/2000, U.N. GAOR Hum. Rts. Comm., 78th Sess., Supp. No. 40, at 231, U.N. Doc. A/58/40 (2003) [hereinafter *Young*].

<sup>176</sup> *Id.* ¶ 2.1. Significantly, the Act defines dependent as a "partner" which, in turn, is defined as a "member of a couple." Further, "member of a couple" is defined as being either legally married or meeting four conditions: (1) living with a person of the opposite sex (called the partner); (2) not being married to the partner; (3) being in a "marriage-like relationship"; and (4) not being in a "prohibited relationship." *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

treatment before the law in derogation of Article 26.<sup>179</sup> In support of his claim, Young cited cases in which the Committee had found that social security legislation was subject to the nondiscrimination provisions of Article 26.<sup>180</sup> He also cited *Toonen v. Australia*,<sup>181</sup> in which the Committee held that the term sex in Article 26 included sexual orientation.<sup>182</sup>

The State opposed the admissibility of Young's communication.<sup>183</sup> However, the Committee disagreed with the State and concluded that Young was in fact a "victim" under the ICCPR Optional Protocol because he was negatively affected by the State's actions due to his sexual orientation.<sup>184</sup> The Committee focused on the merits of the case,<sup>185</sup> noting that "the only reason provided by the domestic authorities in disposing of the author's case was based on the finding that the author did not satisfy the condition of 'living with a person of the opposite

<sup>179</sup> *Id.* ¶ 3.1. Although Young had not exhausted his domestic administrative remedies, he believed that the available appeal would have had no prospect of success because the Commonwealth Administrative Appeals Tribunal would have been bound by the provisions of the VEA. *Id.* ¶ 3.2.

<sup>180</sup> *Young*, ¶ 3.1 (citing *Broeks v. the Netherlands*, Communication No. 172/1984, U.N. GAOR Hum. Rts. Comm., 29th Sess., Supp. No. 40, at 139, U.N. Doc. A/42/40 (1987); *Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, U.N. GAOR Hum. Rts. Comm., 29th Sess., Supp. No. 40, at 160, U.N. Doc. A/42/40 (1987); *Danning v. the Netherlands*, Communication No. 180/1984, U.N. GAOR Hum. Rts. Comm., 29th Sess., Supp. No. 40, at 151, U.N. Doc. A/42/40 (1987)).

<sup>181</sup> *Id.* (citing *Toonen*, *supra* note 162).

<sup>182</sup> *Id.*; see also *supra* notes 162–70 and accompanying text.

<sup>183</sup> *Young*, ¶¶ 4.2–4.8. The bases for the State's opposition were because it deemed (1) that Young was not a victim within the meaning of Article 1 of the Optional Protocol, (2) that Young had not supported his case for admissibility, and (3) that Young had not exhausted his domestic remedies. *Id.*

<sup>184</sup> *Id.* ¶ 9.3. The Committee noted:

[A person] is a victim within the meaning of article 1 of the Optional Protocol, if he/she is personally adversely affected by an act or omission of the State party. The Committee observes that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" by not having lived with a "person of the opposite sex." In the Committee's view it is clear that at least those domestic bodies seized of the case, found the author's sexual orientation to be determinative of lack of entitlement.

*Id.*

<sup>185</sup> *Id.* ¶ 9.4. The Committee concluded that Young had no effective remedies to pursue. *Id.* With respect to exhaustion of Young's claim, the Committee discounted the State's arguments and noted that "domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where the established jurisprudence of the highest domestic tribunals would preclude a positive result." *Id.* The Committee took into account the wording of the sections of the law in question and noted that even the State admitted that the available appeal would not have been successful. *Id.*

sex.”<sup>186</sup> Finding “the prohibition against discrimination under article 26 comprises . . . discrimination based on sexual orientation,”<sup>187</sup> the Committee concluded that the State violated Article 26 of the ICCPR<sup>188</sup> and that Young was entitled to an effective remedy.<sup>189</sup>

These four decisions by the Human Rights Committee reveal the trajectory of international norms at play in cases concerning sexual orientation. One can question whether *Hertzberg* would be decided the same today, particularly in light of *Toonen* and *Young*. Yet given the slow changes with respect to acceptance of same-sex marriage by various states, perhaps *Joslin* would not enjoy a different outcome.

## 2. *European*<sup>190</sup>

In looking at the European Human Rights system, two different parts will set out the existing positions regarding gay and lesbian rights. First, the piece describes initiatives in the Council of Europe, a council of which states must be members to bring claims in the European Court of Human Rights as well as the position of the European Union. Second, the work considers the jurisprudence of the European Court.

### a. *Council of Europe and European Union*

The Council of Europe, founded in 1949, is the oldest political organization in Europe, and was set up to defend human rights, democracy, and the rule of law.<sup>191</sup> It also develops agreements to standardize member states’ social and legal practices.<sup>192</sup> At present, the Council of Europe consists of forty-five states, including twenty-one from Central and Eastern Europe, and it has granted observer status to the United States, Canada, Japan, Mexico, and the Holy See.<sup>193</sup>

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<sup>186</sup> *Id.* ¶ 10.2.

<sup>187</sup> *Id.* ¶ 10.4.

<sup>188</sup> *Id.* ¶¶ 10.4, 11.

<sup>189</sup> *Young*, ¶ 12. The remedy specifically included “the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law.” *Id.*

<sup>190</sup> While this refers to the European regional system, and the countries bound, the member states are not just “Western” powers. The member states are members of the Council of Europe. *See infra* note 193.

<sup>191</sup> THE COUNCIL OF EUROPE, ABOUT THE COUNCIL OF EUROPE, at [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/) (last updated Oct. 2004) [hereinafter ABOUT THE COUNCIL OF EUROPE]; *see also* Statute of Council of Europe, May 5, 1949, art. 1, 87 U.N.T.S. 103 (describing its purpose as the achievement of “greater unity between its members”).

<sup>192</sup> ABOUT THE COUNCIL OF EUROPE, *supra* note 191.

<sup>193</sup> *Id.* The May 5, 1949, Treaty of London which established the Council of Europe was

The position of the Council of Europe with respect to the rights of gays and lesbians has been very progressive since early in its history. In 1981, the Parliamentary Assembly, in Resolution 756<sup>194</sup> and Recommendation 924,<sup>195</sup> addressed discrimination against homosexuals. Resolution 756 provides that “all individuals, once they have reached the legal age provided for in the country they live in, should have the right to sexual self-determination;”<sup>196</sup> and notes that “the theory whereby homosexuality, whether male or female, is a form of mental disturbance has no sound scientific or medical basis, and has been refuted by recent research.”<sup>197</sup> Resolution 756 recognizes that treating homosexuality as a medical or psychological disorder disadvantages and harms gays and lesbians.<sup>198</sup>

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signed by ten states (Belgium, Denmark, France, Ireland, Italy, Luxemburg, the Netherlands, Norway, Sweden, and the United Kingdom). THE COUNCIL OF EUROPE, KEY DATES, at [http://www.coe.int/T/E/com/About\\_Coe/dates.asp](http://www.coe.int/T/E/com/About_Coe/dates.asp) (last visited Nov. 10, 2004). It is noteworthy that these states are all Western European states and constituted a much more homogeneous group than what exists at present. With the signature in Rome on November 4, 1950, of the Council's Convention for the Protection of Human Rights and Fundamental Freedoms, the first international instrument safeguarding human rights came into life. *Id.* Current members and their dates of joining are: Albania (July 13, 1995); Andorra (November 10, 1994); Armenia (January 25, 2001); Austria (April 16, 1956); Azerbaijan (January 25, 2001); Belgium (May 5, 1949); Bosnia & Herzegovina (April 24, 2002); Bulgaria (May 7, 1992); Croatia (November 6, 1996); Cyprus (May 24, 1961); Czech Republic (June 30, 1993); Denmark (May 5, 1949); Estonia (May 14, 1993); Finland (May 5, 1989); France (May 5, 1949); Georgia (April 27, 1999); Germany (July 13, 1950); Greece (August 9, 1949); Hungary (November 6, 1990); Iceland (March 7, 1950); Ireland (May 5, 1949); Italy (May 5, 1949); Latvia (February 10, 1995); Liechtenstein (November 23, 1978); Lithuania (May 14, 1993); Luxembourg (May 5, 1949); Malta (April 29, 1965); Moldova (July 13, 1995); Netherlands (May 5, 1949); Norway (May 5, 1949); Poland (November 26, 1991); Portugal (September 22, 1976); Romania (October 7, 1993); Russian Federation (February 28, 1996); San Marino (November 16, 1988); Serbia and Montenegro (April 3, 2003); Slovakia (June 30, 1993); Slovenia (May 14, 1993); Spain (November 24, 1977); Sweden (May 5, 1949); Switzerland (May 6, 1963); "The former Yugoslav Republic of Macedonia" (November 9, 1995); Turkey (August 9, 1949); Ukraine (November 9, 1995); and the United Kingdom (May 5, 1949). THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE'S MEMBER STATES, at [http://www.coe.int/T/E/com/About/\\_coe/Member\\_States/default.asp](http://www.coe.int/T/E/com/About/_coe/Member_States/default.asp) (last visited Nov. 10, 2004). Finally, Monaco is one state that has an application pending for membership. *Id.* It is important to note that the Council of Europe “is distinct from the 25-nation European Union, but no country has ever joined the Union without first belonging to the Council of Europe.” ABOUT THE COUNCIL OF EUROPE, *supra* note 191.

<sup>194</sup> Resolution 756, EUR. PARL. ASS., 33d Sess. (1981) [hereinafter *Resolution 756*].

<sup>195</sup> Recommendation 924, EUR. PARL. ASS., 33d Sess., (1981) [hereinafter *Recommendation 924*]. This recommendation has not been adopted by the Committee of Ministers.

<sup>196</sup> Resolution 756, *supra* note 194, ¶ 2.

<sup>197</sup> *Id.* ¶ 3.

<sup>198</sup> *Id.* ¶ 4 (noting that it causes “a severe handicap to homosexuals as regards their social, professional and, particularly, psychological development, and can be used in some countries as

Consequently, the Parliamentary Assembly asked "the World Health Organisation to delete homosexuality from its International Classification of Diseases."<sup>199</sup>

Similarly, Recommendation 924 reflects a desire to abolish all forms of discrimination,<sup>200</sup> mentioning that despite "new legislation in recent years directed towards eliminating discrimination against homosexuals, they continue to suffer from discrimination and even, at times, from oppression."<sup>201</sup> The Recommendation, while valuing the traditional family,<sup>202</sup> condemns discrimination.<sup>203</sup> Thus, it made sweeping recommendations to end all discrimination.<sup>204</sup>

Two years later, in Resolution 812,<sup>205</sup> the Assembly reaffirmed its "unshakeable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters."<sup>206</sup> In that vein, the Assembly sought positive actions to treat AIDS and to combat media messages linking AIDS and homosexuality.<sup>207</sup>

More recently Recommendation 1474, entitled *Situation of Lesbians and Gays in Council of Europe Member States*,<sup>208</sup> recognizes and condemns the

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a pretext for repressive psychiatric practices").

<sup>199</sup> *Id.* ¶ 6.

<sup>200</sup> *Recommendation 924, supra* note 195, ¶ 1.

<sup>201</sup> *Id.* ¶ 2.

<sup>202</sup> *Id.* ¶ 3. Specifically, it states: "[T]raditional family life has its own place and value, practices such as the exclusion of persons on the grounds of their sexual preferences from certain jobs, the existence of acts of aggression against them or the keeping of records on those persons, are survivals of several centuries of prejudice." *Id.*

<sup>203</sup> *Id.* ¶ 4 (noting that "in a few member states homosexual acts are still a criminal offense and often carry severe penalties"). The Recommendation provides "that all individuals, male or female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination." *Id.* ¶ 5.

<sup>204</sup> *Id.* ¶ 7. The recommendations included the decriminalization of homosexual acts between consenting adults and the application of the same age of consent for homosexual and heterosexual acts. *Id.* Additionally the recommendations called on member states to end the practice of record-keeping against homosexuals, to ensure equality of treatment for homosexuals regarding "employment, pay and job security," to cease research and medical activity aimed at changing sexual orientation of adults, and to assure that homosexuality not be the cause of restrictive "custody, visiting rights and accommodation of children by their parents." *Id.*

<sup>205</sup> *Resolution 812*, EUR. PARL. ASS., 35th Sess. (1983).

<sup>206</sup> *Id.* ¶ 4.

<sup>207</sup> *See id.* ¶¶ 5-7, 11.

<sup>208</sup> *Recommendation 1474*, EUR. PARL. ASS., 52d Sess. (2000) [hereinafter *Recommendation 1474*].

existence of ongoing discrimination.<sup>209</sup> Based on its observations, the Assembly recommended that the Committee of Ministers add sexual orientation as a prohibited ground of discrimination to the European Convention and extend the terms of the European Commission Against Racism and Intolerance to cover homophobia.<sup>210</sup> Most significantly, it called on member states to take action on eleven significant matters.<sup>211</sup>

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<sup>209</sup> See *id.* ¶¶ 2–3. Specifically, it notes:

[H]omosexuals are still [in 2000] all too often subjected to discrimination or violence, for example, at school or in the street. They are perceived as a threat to the rest of society, as though there were a danger of homosexuality spreading once it became recognised. Indeed, where there is little evidence of homosexuality in a country, this is merely a blatant indication of the oppression of homosexuals. . . .

This form of homophobia is sometimes propagated by certain politicians and religious leaders, who use it to justify the continued existence of discriminatory laws and, above all, aggressive or contemptuous attitudes.

*Id.* Pursuant to the accession procedure for the Council of Europe, it is a prerequisite for membership that homosexual acts between consenting adults cannot be criminal offenses in a state that wishes to join the Council. *Id.* ¶ 4. Yet homosexuality continues to be a criminal offense in some Council states and other discriminations, such as age of consent provision differentials, continue to exist. *Id.* ¶ 5. Significantly contrary to the recommendation of the Parliamentary Assembly, the Committee of Ministers failed to include sexual orientation among the prohibited grounds of discrimination when drafting Protocol No. 12, the protocol that creates a substantive right to nondiscrimination. See *id.* ¶ 7. After final revision, the draft became Protocol No. 12. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* April 11, 2000, Europ. T.S. No. 177, [hereinafter Protocol No. 12]). Thus, the Parliamentary Assembly's desire to include sexual orientation expressly was not adopted. The Recommendation also recognizes that in reality homosexuals are sometimes excluded from employment opportunities and that sometimes there are restrictions on access to the armed forces, *Recommendation 1474, supra* note 208, ¶ 8, and notes that some states have passed laws recognizing homosexual partnerships and homosexuality as grounds for granting asylum when there is a risk for persecution based on sexual orientation. *Id.* ¶ 9.

<sup>210</sup> *Recommendation 1474, supra* note 208, ¶ 11(i)–(ii).

<sup>211</sup> *Id.* ¶ 11(iii). The eleven significant matters seek:

[1] to include sexual orientation among the prohibited grounds for discrimination in their national legislation; [2] to revoke all legislative provisions rendering homosexual acts between consenting adults liable to criminal prosecution; [3] to release . . . anyone imprisoned for sexual acts between consenting homosexual adults; [4] to apply the same minimum age of consent for homosexual and heterosexual acts; [5] to take positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the Bar, as well as in sport, by means of basic and further education and training; [6] to co-ordinate efforts with a view to simultaneously launching a vast public information campaign in as many member states as possible; [7] to take disciplinary action against anyone discriminating against homosexuals; [8] to ensure equal treatment for homosexuals with regard to employment; [9] to adopt legislation which makes provision for registered partnerships; [10] to recognise persecution against homosexuals as a ground for granting asylum; [and 11] to

The European Union<sup>212</sup> also has made great strides in nondiscrimination against gays and lesbians. The 1993 Roth Report<sup>213</sup> detailed equality issues and in response the European Parliament passed a resolution<sup>214</sup> seeking to abolish criminalization of sexual activities,<sup>215</sup> establish same age of consent,<sup>216</sup> and end unequal treatment under legal and administrative provisions.<sup>217</sup> The resolution sought a recommendation from the Commission of the European Community on Equal Rights for Lesbian and Gay Men in support of same-sex marriages or similar arrangements and calling for equal access to adoption rights.<sup>218</sup> Significantly, in June 1997, the European Union's Treaty of Amsterdam empowered the European Council to act expressly against discrimination on the basis of sexual orientation.<sup>219</sup>

These administrative moves elucidate the great strides made by the Council and the European Union in promoting equality for sexual minorities. The case law discussion below reveals similar progress.

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include in existing fundamental rights protection and mediation structures, or establish an expert on, discrimination on grounds of sexual orientation.

*Id.*

<sup>212</sup> The European Union (EU), which started as a common market, today has members that "pool their sovereignty in order to gain a strength and world influence none of them could have on its own" and work together for peace and prosperity. *See* EUROPA: GATEWAY TO THE EUROPEAN UNION, at [http://europa.eu.int/institutions/index\\_en.htm](http://europa.eu.int/institutions/index_en.htm) (last visited Nov. 10, 2004) (providing a general description and overview of the EU). The EU has twenty-five member states: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Greece, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, the Netherlands, and the United Kingdom. *Id.*

<sup>213</sup> *Report of the Committee on Civil Liberties and Internal Affairs of Equal Rights for Homosexuals and Lesbians in the E.C.*, EUR. PARL. DOC. (COM 206.256 final) (1994).

<sup>214</sup> Resolution on Equal Rights for Homosexuals and Lesbians in the E.C., 1994 O.J. (C 61) 40.

<sup>215</sup> *Id.* ¶ 5.

<sup>216</sup> *Id.* ¶ 6.

<sup>217</sup> *Id.* ¶ 7.

<sup>218</sup> *Id.* ¶¶ 12–15.

<sup>219</sup> TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. Article 2(7) provides:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

*Id.* art. 2(7).



## b. Case Law

The first noteworthy jurisprudential breakthrough for gays and lesbians in the international landscape came in the 1981 decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*.<sup>220</sup> The United Kingdom had decriminalized consensual adult gay male sexual activity in England and Wales pursuant to the Sexual Offences Act 1967.<sup>221</sup> However, criminal prohibitions continued in place in Northern Ireland pursuant to the Offences Against the Person Act 1861, which proscribes buggery; the Criminal Law Amendment Act 1885, which punishes “‘gross indecency’ with another male”; and the common law.<sup>222</sup>

Dudgeon, an activist with the Northern Ireland Gay Rights Association, challenged the law when, after a search of his home for drugs pursuant to a warrant which resulted in another’s charge for drug offenses, Dudgeon’s personal papers concerning homosexual activities were seized and he was taken to the police station for questioning. Based on these papers, the Director of Public Prosecutions considered filing a charge of “gross indecency between males” against Dudgeon.<sup>223</sup> The European Convention<sup>224</sup> did not then have a general

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<sup>220</sup> *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1982).

<sup>221</sup> See *id.* ¶ 17. Significantly, “[a]cts of homosexuality between females are not, and have never been, criminal offences.” *Id.* ¶ 15. In Scotland, although the relevant law was similar to Northern Ireland’s, but the policy, based on the Sexual Offences (Scotland) Act 1967, was not to prosecute acts that would be legal under that law. The Criminal Justice (Scotland) Act 1980 saw Scottish law conform to the law in England and Wales. *Id.* ¶ 18.

<sup>222</sup> *Id.* ¶ 14. See also *id.* ¶¶ 19–20, for the relationship of Northern Ireland and its laws to the United Kingdom.

<sup>223</sup> *Id.* ¶ 33. There were never any measures such as the Sexual Offences Act 1967 introduced in the Northern Ireland Parliament. However, an advisory commission on human rights was established to explore the need for legislation in certain fields, including homosexuality and divorce. This body received information from a number of persons and organizations concerning homosexual offenses. In a 1977 report, it concluded that most people did not agree with the retention of legal differences with respect to the treatment of homosexuality and perhaps only a few would be opposed to bringing Northern Ireland into conformity with the laws of England and Wales. Thus, it recommended that the laws of Ireland be brought into line with the 1967 Act. *Id.* ¶¶ 21–23. In 1978, the Northern Ireland government proposed an order which would have had this effect, specifically decriminalizing “homosexual acts in private between two consenting male adults over the age of 21.” *Id.* ¶ 24. Under the proposal, the government recognized that many people, based on religious principles, felt homosexual acts were immoral and ought to be punished under criminal law. *Id.* Nonetheless, the government also recognized a differing view that distinguishes between private conduct which should be permitted as a civil liberty and the public concern for protecting society. *Id.* Public comment on the proposed amendment to the law revealed that there were a large number of individuals and institutions who would be against the proposal, with the strongest critique coming from religious groups such as the Roman Catholic Bishops who “argued that such a change in the law would lead to a further decline in moral standards and to a climate of moral

equality provision,<sup>225</sup> and the existing nondiscrimination article, like the similar provisions in the ICCPR, does not expressly list sexual orientation.

Dudgeon argued that the Northern Ireland proscriptions violated specific rights enumerated in the European Convention: his Article 8 right to respect for private life and his Article 14 rights to be free from discrimination on the grounds of sex, sexuality and residence.<sup>226</sup> The European Court found an Article 8 breach<sup>227</sup> in what was a very good test case.

Article 8 of the European Convention protects the right to respect for private and family life, but expressly provides that the government can interfere with the right if it (1) is pursuant to law, (2) has a legitimate aim, and (3) is necessary in a democratic society.<sup>228</sup> The “necessary in a democratic society” provision specifies four instances of permitted interference.<sup>229</sup> These express exceptions notwithstanding, to be deemed necessary in a democratic society the regulation

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laxity which would endanger and put undesirable pressures on those most vulnerable, namely the young.” *Id.* ¶ 25. On the other hand, the strongest support came from gay organizations and social work agencies who

claimed that the existing law was unnecessary and that it created hardship and distress for a substantial minority of persons affected by it. [They] urged that the sphere of morality should be kept distinct from that of the criminal law and that considerations of the personal freedom of the individual should in such matters be paramount.

*Id.* In the period from January 1972 to October 1980, there were sixty-two prosecutions for homosexual offenses in Northern Ireland, with the majority being cases involving minors—persons under eighteen—although a few involved persons aged eighteen to twenty-one. *Id.* ¶ 30. There was no policy in Northern Ireland to prosecute for acts that would not be offenses if committed in England or Wales. *Id.*

<sup>224</sup> European Convention, *supra* note 12.

<sup>225</sup> Such a provision now exists by virtue of Article 1 of Protocol No. 12, entitled “General prohibition of discrimination.” Protocol No. 12, *supra* note 209, art. 1. It specifically provides:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

*Id.* However, it should be noted that the provision does not include sexual orientation, notwithstanding the European Council’s Committee of Ministers’ recommendation to the contrary. *See supra* note 209 and accompanying text.

<sup>226</sup> *Dudgeon*, ¶ 34.

<sup>227</sup> *Id.* ¶¶ 41, 63. The court concluded “the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8(1).” *Id.* ¶ 41.

<sup>228</sup> European Convention, *supra* note 12, art. 8(2).

<sup>229</sup> *Id.* The four instances are: “[1] in the interest of national security, public safety or the economic well-being of the country, [2] for the prevention of disorder or crime, [3] for the protection of health or morals, or [4] for the protection of the rights and freedoms of others.” *Id.*

must answer a pressing social need and must be proportionate to the legitimate aim being pursued. With respect to sexual orientation, the proportionality inquiry is whether the justifications for retaining the law are outweighed by the detrimental effects the existence of the law can have on the life of a person's homosexual orientation.

As was the case in the international realm, in the European system, individual states are given a "margin of appreciation" to allow for local cultural particularities. The margin given to a community, however, depends not only on the aim of the restriction but also on the nature of the activities involved.<sup>230</sup>

In *Dudgeon*, the United Kingdom could not credibly have claimed that the law was necessary in its democratic society for the protection of health and morals or the protection of the rights and freedoms of others<sup>231</sup> as it had repealed the same laws in England and Wales.<sup>232</sup> Moreover, the European Court noted that "in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied."<sup>233</sup> Indeed, the law was not being enforced in the countries that continued to have legal prohibitions. Thus, the Northern Ireland law was deemed to be out of step with the laws in other European States.

Significantly, the European Court directly addressed the proportionality issue and expressly stated that "[a]lthough members of the public who regard

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<sup>230</sup> See *id.*

<sup>231</sup> See *Dudgeon*, ¶ 52. In reaching its decision, the European Court noted that the Convention's requirement of "necessary" implies "the existence of a 'pressing social need' for the interference in question." *Id.* ¶ 51. Moreover, the European Court recognized that national authorities, in assessing the pressing social need, are allowed a "margin of appreciation" but the national authorities' decision "remains subject to review by the Court." *Id.* ¶ 52. Moreover, "the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right." *Id.* While the margin of appreciation is greater where the issue pertains to the protection of morals, it is "not only the nature of the aim of the restriction but also the nature of the activities involved" that affects the scope of the margin of appreciation. *Id.* Because the *Dudgeon* case concerned a "most intimate aspect of private life," the European Court noted that national authorities must have "particularly serious reasons before [their] interferences . . . can be legitimate for the purposes of Article 8(2)." *Id.* Furthermore, for a limitation to be deemed as "'necessary in a democratic society' (two hallmarks of which are tolerance and broadmindedness) [it must be] proportionate to the legitimate aim pursued." *Id.* ¶ 53. The European Court recognized the government's argument that society in Northern Ireland was more conservative and placed more emphasis on religious factors than Great Britain and thus there were different views with respect to questions of morality. In fact, the European Court recognized that "[w]here there are disparate cultural communities residing within the same [s]tate, it may well be that different requirements, both moral and social, will face the governing authorities." *Id.* ¶ 56.

<sup>232</sup> *Id.* ¶ 17. See *supra* note 221 and accompanying text (noting discrimination of sodomy).

<sup>233</sup> *Id.* ¶ 60.

homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.”<sup>234</sup> The deleterious impact of the law on homosexuals could not be justified by the preferences or prejudices of the majority.

The European Court, like the Committee, found privacy and equality inextricably intertwined.<sup>235</sup> Consequently, it did not find it necessary to separately analyze the case under the nondiscrimination provisions of Article 14.<sup>236</sup> After *Dudgeon*, the European Court, using the same reasoning, ruled against similar laws in *Norris v. Ireland*<sup>237</sup> and *Modinos v. Cyprus*.<sup>238</sup> In 1997, in *Sutherland v. United Kingdom*,<sup>239</sup> the European Commission on Human Rights applied privacy reasoning to strike down regulations establishing different ages of consent for homosexual and heterosexual acts.<sup>240</sup> The Commission relied on changed medical views on homosexuality and observed that the law could inhibit efforts to improve sexual health of young homosexual and bisexual men.<sup>241</sup>

Cases focusing on different activities have had different outcomes. For example, in 2000, in *A.D.T. v. United Kingdom*,<sup>242</sup> the European Court

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* ¶ 67. The European Court held:

Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the court also to examine the case under Article 14, though the position is otherwise of a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.

*Id.*

<sup>236</sup> *Id.* ¶ 70.

<sup>237</sup> *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), 13 Eur. H.R. Rep. 186 (1989) (holding that a sodomy law in Ireland making homosexual practices between consenting adults criminal offenses violated the right of privacy found in Article 8 of the Convention and that the laws are not necessary in a democratic society for the protection of morals and for the protection of the rights of others).

<sup>238</sup> *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993), 16 Eur. H.R. Rep. 485 (1993) (holding that a sodomy law, even if not enforced, effected an interference with applicant's private life and needs to be repealed).

<sup>239</sup> *Sutherland v. United Kingdom*, 24 Eur. H.R. Rep. CD 22 (1997).

<sup>240</sup> *Id.* ¶ 66. The minimum age for lawful homosexual activities between men was eighteen compared to age sixteen for lawful heterosexual conduct. *Id.* ¶ 20–23. Having declared the application admissible, the Commission opined there was a violation of Article 8 taken in conjunction with Article 14. *Id.* ¶¶ 9, 67.

<sup>241</sup> *Id.* ¶ 59. Because laws were passed to equalize age of consent provisions, the European Court struck the case from its list. *Id.* ¶¶ 20–22; *Sutherland v. United Kingdom*, App. No. 25186/94 (Eur. Ct. H.R. March 27, 2001), [http://www.echr.coe.int/Eng/EDocs/SUBJECT\\_MATTER\\_2001\\_TABLE.pdf](http://www.echr.coe.int/Eng/EDocs/SUBJECT_MATTER_2001_TABLE.pdf).

<sup>242</sup> *A.D.T. v. United Kingdom*, 31 Eur. H.R. Rep. 33 (2001).

invalidated proscriptions against group sex.<sup>243</sup> However, in *Laskey v. United Kingdom*, the European Court upheld a prohibition against sadomasochistic acts.<sup>244</sup> In *Laskey*, the police, while routinely investigating other matters, obtained video films made during sadomasochistic encounters.<sup>245</sup> The applicants challenged their convictions and sentences in the domestic courts before the European Court, claiming that their prosecutions and convictions violated Article 8 of the Convention.<sup>246</sup> In this case, the European Court observed that not all sexual activities carried out behind closed doors were necessarily protected as private conduct pursuant to Article 8.<sup>247</sup>

Because the private nature of the conduct was not at issue,<sup>248</sup> the European Court considered whether the interference with privacy was necessary in a democratic society within the meaning of Article 8(2).<sup>249</sup> The European Court, recognizing the margin of appreciation, observed that one of the roles of the State is the regulation of activities that involve infliction of physical harm, regardless of whether the activities at issue occur in the context of private sexual conduct.<sup>250</sup> It concluded that it is up to the State to decide what level of harm might be acceptable in instances where there is consent by the victim based on the state's

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<sup>243</sup> See *id.* ¶¶ 37–38.

<sup>244</sup> *Laskey v. United Kingdom*, 24 Eur. H.R. Rep. 39 (1997).

<sup>245</sup> *Id.* ¶ 8. It was posited that the encounters

were consensual and were conducted in private for no apparent purpose other than the achievement of sexual gratification. The infliction of pain was subject to certain rules including the provision of a code word to be used by any “victim” to stop an “assault”, and did not lead to any instances of infection, permanent injury or the need for medical attention.

*Id.*

<sup>246</sup> *Id.* ¶ 32.

<sup>247</sup> *Id.* ¶ 36.

<sup>248</sup> *Id.* Nonetheless, the Court observed:

[T]he applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. . . . [And while] sexual orientation and activity concern an intimate aspect of private life. . . . a considerable number of people were involved in the activities in question which included, *inter alia*, the recruitment of new “members”, the provision of several specially-equipped “chambers”, and the shooting of many videotapes which were distributed among the “members”. . . . It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of “private life” in the particular circumstances of the case.

*Id.*

<sup>249</sup> *Id.* However, although the European Court declined to raise on its own the issue of whether the conduct engaged was really private, it insinuated that the nature of group activity would have led it to conclude that it was not. *Id.*

<sup>250</sup> *Laskey v. United Kingdom*, 24 Eur. H.R. Rep. 39, ¶ 43 (1997).

obligation to protect public health.<sup>251</sup> Here, because the activity “involved a significant degree of injury or wounding which could not be characterised as trifling or transient,”<sup>252</sup> the European Court concluded that “the reasons given by the national authorities for the measures taken in respect of the applicants were relevant and sufficient for the purposes of Article 8(2).”<sup>253</sup>

Two 1999 cases in which the European Court considered a challenge to the United Kingdom’s ban on homosexuals in the military are noteworthy because these decisions still represent a position hugely divergent from the U.S. stance. In both cases, *Smith v. United Kingdom*<sup>254</sup> and *Lustig-Prean v. United Kingdom*,<sup>255</sup> the government conceded that the ban interfered with the right of individuals to respect for their private lives, but claimed it was justified. The European Court disagreed with the government’s position.<sup>256</sup>

Utilizing the same Article 8 analytical paradigm used in nonmilitary cases, the European Court emphasized that, because the relevant restrictions concerned “a most intimate aspect of an individual’s private life,” there had to be “particularly serious reasons” for the State’s interference in order to be legitimate under Article 8.<sup>257</sup> The European Court acknowledged that the State would be given a certain margin of appreciation based on its national security explanation.<sup>258</sup> The State may “impose restrictions on an individual’s right to respect for private life where there is a real threat to the armed forces’ operational effectiveness,” but the State “cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives.”<sup>259</sup> In these cases, as in *Dudgeon*, the European Court looked to changed practices and observed that, even in the military context, the hallmarks of a

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<sup>251</sup> *Id.* ¶ 44.

<sup>252</sup> *Id.* ¶ 45.

<sup>253</sup> *Id.* ¶ 48. The government had argued that “the State was entitled to punish acts of violence . . . that could not be considered of a trifling or transient nature, irrespective of the consent of the victim.” *Id.* ¶ 40. In addition, the government had argued that the criminal law was the appropriate location for the state to prohibit conduct on public health grounds as well as for broader moral reasons: “In this respect, acts of torture—such as those in issue in the present case—may be banned also on the ground that they undermine the respect which human beings should confer upon each other.” *Id.* It is noteworthy that the majority of the decision in the House of Lords had noted that “the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the Act of 1861. They establish that consent is a defense to the infliction of bodily harm in the course of some lawful activities.” *Id.* ¶ 20 (quoting court of appeal holding in *R. v. Brown*, 2 All E.R. 75 (1993)).

<sup>254</sup> *Smith v. United Kingdom*, 29 Eur. H.R. Rep. 493 (2000).

<sup>255</sup> *Lustig-Prean v. United Kingdom*, 29 Eur. H.R. Rep. 548 (2000).

<sup>256</sup> *Smith*, 29 Eur. H.R. Rep. ¶ 98; *Lustig-Prean*, 29 Eur. H.R. Rep. ¶ 111.

<sup>257</sup> See *Smith*, 29 Eur. H.R. Rep. ¶ 89; *Lustig-Prean*, 29 Eur. H.R. Rep. ¶ 82.

<sup>258</sup> See *Smith*, 29 Eur. H.R. Rep. ¶ 88; *Lustig-Prean*, 29 Eur. H.R. Rep. ¶ 81.

<sup>259</sup> *Smith*, 29 Eur. H.R. Rep. ¶ 89; *Lustig-Prean*, 29 Eur. H.R. Rep. ¶ 82.

democratic society are “pluralism, tolerance and broadmindedness.”<sup>260</sup> Thus, the perceived problems of effectiveness were “founded solely upon negative attitudes of heterosexual personnel” and such prejudice was insufficient to uphold the regulation.<sup>261</sup>

Another significant 1999 case is *Da Silva Mouta v. Portugal*.<sup>262</sup> Mouta, who had a child during his marriage, began living with a man after separating from his wife. During the divorce proceedings, he and his estranged wife entered into an agreement giving her parental responsibility and him a right to contact the child. Because the mother failed to comply with the agreement, Mouta was unable to enjoy his right to contact; he sought and was awarded parental responsibility by the local court.<sup>263</sup>

The mother successfully appealed the parental responsibility award. It was plain that the father’s homosexuality, which the local court viewed as “not normal,” played a key role in its award of parental responsibility to the mother.<sup>264</sup>

<sup>260</sup> *Smith*, 29 Eur. H.R. Rep. ¶ 87; *Lustig-Prean*, 29 Eur. H.R. Rep. ¶ 80.

<sup>261</sup> *Smith*, 29 Eur. H.R. Rep. ¶ 96; *Lustig-Prean*, 29 Eur. H.R. Rep. ¶ 89.

<sup>262</sup> *Da Silva Mouta v. Portugal*, 31 Eur. H.R. Rep. 47 (2001).

<sup>263</sup> *See id.* ¶¶ 9–12.

<sup>264</sup> *Id.* ¶ 14. The local court observed:

[The father is homosexual and while] society is increasingly tolerant of such situations[, it] cannot [be] argue[d] that an environment of that nature is the most healthy and adequate for the moral, social and mental development of a child. . . . The child has to live within a family, a traditional Portuguese family, which is clearly not that which the father has decided to establish, since he lives with a man as if they were man and wife. It is not necessary to enquire here whether or not homosexuality is an illness or if it is a sexual orientation as between persons of the same sex. In either case one is confronted with an abnormality and a child should not have to grow up under the shadow of an abnormal situation; it is human nature that says so, and we note that it is [the applicant] himself who recognised this when, in the initial application of 5 July 1990, he stated that he had finally left the marital home to live with a male friend, a decision which is not normal by common standards.

*Id.* (quoting local court case). It would be interesting to interrogate what the court meant by “a traditional Portuguese family” as the mother had a live-in boyfriend and the daughter spent most of her time with her maternal grandparents who were Jehovah Witnesses who, because of their “religious fanaticism,” condemn the father, exclude him, interfere with visitation, and “contribute[] to sowing confusion in the child and increasing her internal conflicts and her anxiety, while compromising her proper psycho-affective development” *Id.* ¶¶ 14(8), 14(12), 14(27). Significantly, one of the three court of appeal judges concurred in the result but stated:

I have voted for the decision although I consider that it is not legitimate from a constitutional point of view to assert as a matter of principle that a person can be excluded from his family rights by reference to his sexual orientation. Accordingly such orientation cannot in itself be considered in any case as being classified as abnormal. The right to differ cannot be transformed into a false right to live in a ghetto.

*Id.* ¶ 15 (quoting court of appeal decision).

After unsuccessful attempts to see his daughter,<sup>265</sup> Mouta took his case to the European system claiming that the domestic court's award of parental responsibility to the mother was based on his sexual orientation, impermissibly violating Articles 8 and 14.<sup>266</sup> The European Court, while recognizing the domestic court's concern for the best interests of the child, concluded that the award of parental responsibility to the mother based on Mouta's homosexuality constituted discriminatorily different treatment<sup>267</sup> and violated Article 14.<sup>268</sup> While the Court of Appeal decision pursued a legitimate aim, "the protection of the child's health and rights,"<sup>269</sup> the basis of the decision was discriminatory.<sup>270</sup> The domestic court judgment revealed that the father's homosexuality was a "decisive" factor in the final decision.<sup>271</sup> Because distinctions based on sexual orientation are unacceptable under the European Convention,<sup>272</sup> the European Court held that there was no "reasonable relationship of proportionality . . . between the means used and the aim envisaged."<sup>273</sup> The European Court did not rule specifically on an Article 8 violation because "the arguments advanced on this point coincide[d] in substance with those already considered in the context of Article 8 taken in conjunction with Article 14."<sup>274</sup>

Perhaps surprising after the *Mouta* case (but perhaps predictive of *Lofton v. Secretary of Department of Children and Family Services*<sup>275</sup>) is the 2002 case of *Fretté v. France*.<sup>276</sup> Fretté challenged the French court's dismissal of his

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<sup>265</sup> *Id.* ¶ 18. Because the mother never respected the father's right to contact, Mouta applied with the domestic court for enforcement of the court of appeal decision and, in connection with those proceedings, he learned that his daughter was living in the north of Portugal. *Id.*

<sup>266</sup> *See id.* ¶ 21.

<sup>267</sup> *Id.* ¶ 29. The European Court held "a difference in treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is to say, if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means used and the aim envisaged." *Id.*

<sup>268</sup> *Da Silva Mouta v. Portugal*, 31 Eur. H.R. Rep. 47, ¶ 28 (2001) (concluding that "there was a difference of treatment between the applicant and M.'s mother, which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention").

<sup>269</sup> *Id.* ¶ 30.

<sup>270</sup> *Id.* ¶ 31. "[T]he reasoning of the judgment demonstrably show[ed] that the decision to grant custody to the mother was based essentially on the sexual orientation of the father, which led inevitably to discriminatory treatment of the latter as compared with the other parent." *Id.*

<sup>271</sup> *Id.* ¶ 35 (based on passages from the court of appeal judgment).

<sup>272</sup> *Id.* ¶ 36 (finding an Article 14 violation).

<sup>273</sup> *Id.*

<sup>274</sup> *Da Silva Mouta v. Portugal*, 31 Eur. H.R. Rep. 47, ¶ 37 (2001).

<sup>275</sup> *Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004); see also *infra* notes 635–52 and accompanying text.

<sup>276</sup> *Fretté v. France*, 8 Eur. H.R. Rep. 21 (2004), available at <http://echr.coe.int>.



application for authorization to adopt,<sup>277</sup> based solely on prejudice about his sexual orientation,<sup>278</sup> as an arbitrary interference with his private and family life in violation of Article 8. The French government representative, while noting the protected right under Article 8 to privacy and family life, nevertheless concluded, focusing on the child's interest,<sup>279</sup> that Fretté should not be given authorization to adopt for various reasons.<sup>280</sup>

Fretté challenged the denial of authorization to adopt based on his sexual orientation as impermissible<sup>281</sup> and thus constituting a breach of Article 14 taken in conjunction with Article 8.<sup>282</sup> The government, on the other hand, said that the

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<sup>277</sup> *Id.* ¶ 12. Although interviews of Fretté showed that he was a sensitive man who had thought much about child rearing, his request for reconsideration of the decision to dismiss his application to adopt was dismissed by the domestic court which noted "among other things, that the applicant's 'choice of lifestyle' did not appear to be such as to provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family perspective." *Id.* ¶¶ 10–11 (quoting the October 15, 1993 government authority's decision dismissing request for reconsideration).

<sup>278</sup> *Id.* ¶ 13.

<sup>279</sup> *Id.* ¶ 15. On his application for judicial review, the Paris Administrative Court set aside the decision refusing the authorization for Fretté to adopt which was then appealed by Paris Social Services to the Conseil d'Etat. The government commissioner reported that:

the question whether a child is in danger of being psychologically disturbed by his relationship with an adult who cannot offer him or her the reference point of a distinct father and mother, in other words a model of sexual difference, is a very difficult one which divides psychiatrists and psycho-analysts. Adopted children are all the more in need of a stable and fulfilling family environment because they have been deprived of their original family and have already suffered in the past. This makes it all the more important that they do not encounter any further problems within their adopted family. . . .

*Id.* (quoting Sept. 16, 1996 government commissioner's report concurring with Paris Social Services position).

<sup>280</sup> *Id.* ¶ 16. The Conseil d'Etat set aside the Administrative Court's judgment and rejected Fretté's application for authorization to adopt stating that

[f]rom the information in the case-file, particularly the evidence gathered when investigating Mr. Fretté's application, it emerges that [Mr. Fretté] having regard to his lifestyle and despite his undoubted personal qualities and aptitude for bringing up children, did not provide the requisite safeguards—from a child-rearing, psychological and family perspective—for adopting a child.

*Id.* (quoting Oct. 9, 1996 Conseil d'Etat's finding, ruling on merits).

<sup>281</sup> *Id.* ¶ 28. Fretté "maintained that practically any difference in treatment based on sexual orientation amount[s] to interference in a homosexual's private life because it required him to choose between denying his sexual orientation or being penalised, unlike anybody else." *Id.* Significantly, the basis of the argument was the government's recognition that, given this decision at the domestic level, homosexuals might be inclined to try to hide their sexual orientation in order to be able to adopt. *Id.* ¶ 15.

<sup>282</sup> *Fretté*, 31 Eur. H.R. Rep. ¶ 26. In this case, the European Court noted that while Article 14 could complement the other substantive provisions of the Convention and its

matter was not about sexual orientation but rather about the right to adopt.<sup>283</sup>

The European Court, noting that the Convention does not guarantee the right to adopt and that right to respect for family life does not safeguard a desire to found a family, concluded the denial of Fretté's application for authorization to adopt did not effect an Article 8 violation.<sup>284</sup> However, because French law allows adoption by single people, if the denial of Fretté's authorization to adopt was based on his sexual orientation, then it would be covered under Article 14.<sup>285</sup> Although the decision to deny Fretté's application to adopt was based decisively on his sexuality,<sup>286</sup> it pursued "a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure."<sup>287</sup> Focusing on a State's margin of appreciation<sup>288</sup> to decide to what extent differences justify different treatment in law, noting there is no uniformity or "common ground" between the laws of the state parties to the European Convention regarding adoption by homosexuals,<sup>289</sup> and distinguishing this case from one in which there

protocols,

[i]t has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Art[icle] 14 does not presuppose a breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts at issue fall within the ambit of one or more of the provisions of the Convention.

*Id.* ¶ 27 (footnote omitted).

<sup>283</sup> *Id.* ¶ 29.

<sup>284</sup> *Id.* ¶ 32 (holding the denial "could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life").

<sup>285</sup> *Id.* ¶ 33.

<sup>286</sup> *Id.* ¶ 37.

<sup>287</sup> *Id.* ¶ 38.

<sup>288</sup> *Fretté*, 31 Eur. H.R. Rep. ¶ 41. The Court stated:

The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground among[] the Member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.

*Id.*

<sup>289</sup> *Id.* ¶¶ 40–41 (finding "there is no common ground on the question . . . [and] it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonable differ widely").

already exists a bond between a parent and a child,<sup>290</sup> the European Court accepted the domestic decision as legitimate and nondiscriminatory.<sup>291</sup>

Two other 2002 cases, however, are more positive. The decisions in *Goodwin v. United Kingdom*<sup>292</sup> and *I. v. United Kingdom*<sup>293</sup> are landmarks for transsexual rights. In *Goodwin*, the post-operative transsexual applicant sought a change in her national insurance number to avoid work-related harassment based on her transsexual status, to be able to retire at the age designated for women, and to marry, which is defined as the union between a man and a woman.<sup>294</sup> The *Goodwin* Court found an Article 8 violation in the government's refusal to issue new documents<sup>295</sup> and an Article 12 violation of the fundamental right to marry in the denial of a marriage license based purely on gender status, which is biologically determined.<sup>296</sup> The European Court ordered the United Kingdom to change the information on Christine Goodwin's birth certificate, and to allow her to marry a man.<sup>297</sup> Similarly, and for the same reasons articulated in *Goodwin*, in *I. v. United Kingdom* the European Court found violations of Articles 8 (privacy)<sup>298</sup> and 12 (right to marry).<sup>299</sup>

The following year, the European Court considered *Van Kück v. Germany*,<sup>300</sup> a case of a pre-operative male-to-female transsexual. Van Kück's health insurance denied claims for reimbursement for medical treatment related to sex-reassignment, and local courts upheld the denial stating that "hormone treatment and re-assignment operations could not reasonably be considered as necessary medical treatment."<sup>301</sup> The European Court<sup>302</sup> noted that the basic object of

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<sup>290</sup> *Id.* ¶ 42.

<sup>291</sup> *Id.* ¶ 43 (concluding that "the justification given by the Government appears objective and reasonable and the difference in treatment complained of is not discriminatory for the purposes of Art[icle] 14 of the Convention").

<sup>292</sup> *Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18 (2002). The applicant is a post-operative male-to-female transsexual. *Id.* ¶ 12.

<sup>293</sup> *I. v. United Kingdom*, 36 Eur. H.R. Rep. 53 (2002).

<sup>294</sup> See *Goodwin*, 35 Eur. H.R. Rep. ¶¶ 15–16, 17, 21.

<sup>295</sup> *Id.* ¶ 93.

<sup>296</sup> *Id.* ¶¶ 100, 104. The Court found "good reason" to depart from precedent, finding no Article 8 violation in the government's refusal to alter birth certificates and other forms of identification. *Id.* ¶¶ 74–75. It specifically noted changing social conditions and legal findings as well as an emerging consensus in the member states that transsexual's rights should be protected. *Id.* ¶ 84.

<sup>297</sup> *Id.* ¶ 120 (ordering the United Kingdom "to implement such measures . . . to fulfil its obligations to serve the applicant's . . . right to respect for private life and right to marry in compliance with [the Court's] judgment").

<sup>298</sup> *I. v. United Kingdom*, 36 Eur. H.R. Rep. ¶ 73.

<sup>299</sup> *Id.* ¶ 84.

<sup>300</sup> *Van Kück v. Germany*, 37 Eur. H.R. Rep. 51 (2003).

<sup>301</sup> *Id.* ¶ 16 (citing Aug. 3, 1993 regional court finding). Subsequently, the court of appeal

Article 8 is “to protect the individual against arbitrary interference by the public authorities”<sup>303</sup> and to have regard for a fair balance “between the general interest and the interests of the individual.”<sup>304</sup> Because the case concerns “a most intimate part of an individual’s life,”<sup>305</sup> touching on self-determination,<sup>306</sup> the Court concluded that “no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other.”<sup>307</sup> Because “the German authorities overstepped the margin of appreciation afforded to them,”<sup>308</sup> the Court found an Article 8 violation.

Three other significant cases were decided in 2003. In *Karner v. Austria*,<sup>309</sup> Karner, a gay man who lived with his partner in an apartment in Vienna from 1989 until 1994 when his partner died, brought the case when the Austrian Supreme Court granted the landlord’s request to terminate Karner’s tenancy.<sup>310</sup> The apartment had been rented in 1988 by Mr. Karner’s partner. Although Karner died,<sup>311</sup> Karner’s lawyer underscored the importance of the issue and the case with respect to human rights<sup>312</sup> and asked that it be considered.<sup>313</sup>

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upheld the regional court finding, dismissing the appeal. *Id.* ¶ 22.

<sup>302</sup> The European Court also found a violation of Article 6 because the proceeding did not satisfy the requirements of a fair hearing. *Id.* ¶ 64.

<sup>303</sup> *Id.* ¶ 70.

<sup>304</sup> *Id.* ¶ 71.

<sup>305</sup> *Id.* ¶ 72.

<sup>306</sup> *Van Kück*, 37 Eur. H.R. Rep. ¶ 73 (2003) (noting that “the civil court proceedings touched upon the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination”).

<sup>307</sup> *Id.* ¶ 84.

<sup>308</sup> *Id.* ¶ 85. The European Court also found that as “the applicant’s complaint[,] that she was discriminated against on grounds of her transsexuality amounts in effect to the complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 6 § 1 and, more particularly, Article 8 . . . ,” it does not give rise to a separate issue under Article 14. *Id.* ¶¶ 91–92.

<sup>309</sup> *Karner v. Austria*, 38 Eur. H.R. Rep. 24 (2004).

<sup>310</sup> *Id.* ¶ 15. In December, the Austrian Supreme Court granted the landlord’s appeal, quashing the lower court’s decision that the Rent Act’s provision that allowed family members to succeed to a tenancy was applicable to homosexual relationships, reversing the regional civil court’s dismissal of the landlord’s appeal, and terminating the lease finding that “life companion” in the Rent Act did not include persons of the same sex. *Id.* ¶¶ 11–15.

<sup>311</sup> *Id.* ¶¶ 16–18 (his mother waived the right to succeed to the estate, and the lawyer was working to trace other heirs who might succeed to the lease).

<sup>312</sup> *Id.* ¶ 27. The European Court considered that

the subject matter of the present application—the difference in treatment of homosexuals as regards succession to tenancies under Austrian law—involves an important question of general interest not only for Austria but also for other Member States of the Convention. . . . Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the

Karner claimed the Austrian Supreme Court's decision denying him the status of "life companion" constituted discrimination on the grounds of his sexual orientation and a violation of Article 14 of the Convention, taken together with Article 8.<sup>314</sup> The government conceded that, in respect to succession to the tenancy, Karner was treated differently because of his sexual orientation, but claimed that such different treatment was justified to protect the traditional family.<sup>315</sup> The European Court, noting that "very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention,"<sup>316</sup> concluded that Austria had a narrow margin of appreciation, and that the means used were not proportional to the ends.<sup>317</sup> Consequently, the European Court found a violation of Article 14 taken together with Article 8.<sup>318</sup>

The two other 2003 cases, also coming out of Austria, and in contrast to *State v. Limon*,<sup>319</sup> invalidated differential age of consent provisions for homosexual and heterosexual conduct. At issue in both *L. and V. v. Austria*<sup>320</sup> and *S.L. v. Austria*<sup>321</sup> were Articles 206, 207, and 209 of the Austrian Criminal Code, which criminalized any sexual acts with people under fourteen years of age<sup>322</sup> and

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Convention.

*Id.* Consequently, the European Court did not strike the application. *Id.* ¶ 28.

<sup>313</sup> *Id.* ¶ 21.

<sup>314</sup> *Id.* ¶ 29.

<sup>315</sup> *Karner*, 38 Eur. H.R. Rep. ¶ 35 (claiming it had "an objective and reasonable justification, as the aim of the relevant provision of the Rent Act had been the protection of the traditional family").

<sup>316</sup> *Id.* ¶ 37.

<sup>317</sup> *Id.* ¶ 41. The Court held:

The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aims sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of the application of [the law] to achieve that aim. The Court cannot see that the Government has advanced any argument that would allow such a conclusion.

*Id.*

<sup>318</sup> *Id.* ¶¶ 42–43.

<sup>319</sup> *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004); see also *infra* notes 667–76 and accompanying text.

<sup>320</sup> *L. and V. v. Austria*, 36 Eur. H.R. Rep. 55 (2003).

<sup>321</sup> *S.L. v. Austria*, 37 Eur. H.R. Rep. 39 (2003).

<sup>322</sup> See *L. and V.*, 36 Eur. H.R. Rep. ¶ 17; *S.L.*, 37 Eur. H.R. Rep. ¶ 11.

consensual homosexual acts,<sup>323</sup> consensual heterosexual or lesbian acts between adults and people over fourteen years of age were not covered.<sup>324</sup> The Austrian Constitutional Court found no discrimination,<sup>325</sup> as these provisions seek to legitimately protect youths<sup>326</sup> from “developing sexually in the *wrong way*.”<sup>327</sup> The challenge in both cases relied on Article 8 of the European Convention, taken alone and in conjunction with Article 14, alleging that Article 209 violates the right to respect for private life, and that the provision is discriminatory<sup>328</sup> because heterosexual or lesbian conduct between adults and adolescents of the same age bracket was not punishable.<sup>329</sup> The European Court noted that there existed consensus in Europe to reduce consent age for homosexual relations<sup>330</sup> and that, in light of such consensus, the Austrian government had no justification<sup>331</sup> for

<sup>323</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 18; *S.L.*, 37 Eur. H.R. Rep. ¶ 12. The law provided that “[a] male person who after attaining the age of nineteen fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years shall be sentenced to imprisonment for between six months and five years.” *L. and V.*, 36 Eur. H.R. Rep. ¶ 18; *S.L.*, 37 Eur. H.R. Rep. ¶ 12.

<sup>324</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 19; *S.L.*, 37 Eur. H.R. Rep. ¶ 13.

<sup>325</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 23; *S.L.*, 37 Eur. H.R. Rep. ¶ 16 (finding that Article 209 of the Criminal Code “was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein”).

<sup>326</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 46; *S.L.*, 37 Eur. H.R. Rep. ¶ 38. The European Court accepted the government’s assertion that Article 209 served to protect the sexual development of male adolescents and that such a protection is a legitimate one. *L. and V.*, 36 Eur. H.R. Rep. ¶ 46; *S.L.*, 37 Eur. H.R. Rep. ¶ 38.

<sup>327</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 24; *S.L.*, 37 Eur. H.R. Rep. ¶ 17 (emphasis added) (noting that the “criminal provision which has been challenged is included in the group of acts considered unlawful in order to protect—to an extent thought to be unavoidable—a young, maturing person from developing sexually in the wrong way”).

<sup>328</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 38 (citations omitted); *S.L.*, 37 Eur. H.R. Rep. ¶ 30. Applicants in both cases claimed

that in Austria, like in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over fourteen years of age were not punishable. . . . While not being necessary for protecting male adolescents in general, Article 209 of the Criminal Code also hampered homosexual adolescents in their development by attaching social stigma to their relations with adult men and to their sexual orientation in general . . . [noting] that any interference with a person’s sexual sphere and any difference in treatment based on sex or sexual orientation requires particularly weighty reasons.

*Id.*

<sup>329</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 34; *S.L.*, 37 Eur. H.R. Rep. ¶ 27.

<sup>330</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶¶ 38–39; *S.L.*, 37 Eur. H.R. Rep. ¶ 30–32.

<sup>331</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 52; *S.L.*, 37 Eur. H.R. Rep. ¶ 44. The Court held there did not exist a justification for the differential treatment because:

Article 209 of the Criminal Code embodied a predisposed bias on the part of a

upholding such a differential in age of consent.<sup>332</sup> Consequently, Article 209's differential treatment effected a violation of Article 14 taken in conjunction with Article 8.<sup>333</sup>

These cases, with perhaps the possible exception of *Fretté*—the adoption case the social basis of which, in all events, may well be changing—elucidate two critical factors for the later analysis in *Lawrence*. First, they provide that sexual orientation is a category, like race, origin, or color, upon which people should not be subjected to different treatment without high justification by the state. In this regard, bias of the majority is not an appropriate ground to justify differential treatment. Second, and important in the consideration of methodological approaches, the European Court cases show that there is an intimate relation between the concept of nondiscrimination and the right to privacy. This is especially important with regard to gay and lesbian people because the differential treatment is inextricably intertwined with the conduct that falls within the zone of privacy. In other words, the rights to privacy and equality are conflated when the conduct that is the subject of the right is definitional to the status based upon which unequal treatment is deployed.

### 3. Foreign Cases

In considering the jurisprudence concerning gays and lesbians, several foreign cases are noteworthy. The first two are 2003 cases from the highest courts of two Canadian provinces, British Columbia and Ontario, in which the courts ruled that to deny marriage licenses to same sex couples constitutes a violation of the equality provisions of the Canadian Charter of Rights and Freedoms (Canadian Charter), and ordered that gays and lesbians be provided with the right to be married.<sup>334</sup>

In *Halpern v. Canada*, after quoting the classic formulation of marriage,<sup>335</sup> the Court considered “whether the exclusion of same-sex couples from this

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heterosexual majority against a homosexual minority, [and] these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.

*L. and V.*, 36 Eur. H.R. Rep. ¶ 52 (citation omitted); *S.L.*, 37 Eur. H.R. Rep. ¶ 44 (citation omitted).

<sup>332</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶ 39; *S.L.*, 37 Eur. H.R. Rep. ¶ 31.

<sup>333</sup> *L. and V.*, 36 Eur. H.R. Rep. ¶¶ 53–54; *S.L.*, 37 Eur. H.R. Rep. ¶¶ 45–46.

<sup>334</sup> *EGALE Canada Inc. v. Canada*, [2003] CarswellBC 1006 (B.C.C.A.); *Halpern v. Canada*, [2003] CarswellOnt 2159 (O.C.A.).

<sup>335</sup> *Halpern*, [2003] CarswellBC 1006, ¶ 1 (“I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”) (quoting Lord Penzance, writing for the majority, in *Hyde v. Hyde*, [1866] 1 L.R.-P. & D. 130, 133).

common law definition of marriage breaches ss. 2(A) or 15(1) of the [Canadian Charter]<sup>336</sup> in a manner that is not justified in a free and democratic society under s. 1 of the *Charter*.<sup>337</sup> The Court acknowledged that “this case is ultimately about the recognition and protection of human dignity and equality in the context of the social structures available to conjugal couples in Canada.”<sup>338</sup> Although marriage is a social, religious, and legal institution<sup>339</sup> that “does not have a constitutionally fixed meaning,”<sup>340</sup> the case concerned only the legal aspect of marriage.<sup>341</sup> The Court ruled that once the Canadian government chose to recognize marriage and provide myriad rights and obligations pursuant thereto,<sup>342</sup> it was obligated to do it in a nondiscriminatory manner.<sup>343</sup> Having established that there was differential treatment,<sup>344</sup> the Court concluded that it was done on a ground analogous to the enumerated prohibited grounds in section 15 of the Canadian Charter.<sup>345</sup> In the next stage of the inquiry, the Court decided that the differential treatment was burdensome<sup>346</sup> because of “[t]he disadvantages and vulnerability experienced by gay men, lesbians and same-sex couples.”<sup>347</sup> This historical disadvantage suffered by gays and lesbians was an indicator of

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<sup>336</sup> *Id.* ¶ 59. Section 15(1) of the Canadian Charter is an equality provision that prohibits discrimination based “on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Id.* (quoting the Canadian Charter). The purpose of the Charter is to “prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings. . . .” *Id.* ¶ 60 (quoting *Law v. Canada*, [1999] CarswellNat 359, 529).

<sup>337</sup> *Id.* ¶ 1.

<sup>338</sup> *Id.* ¶ 2.

<sup>339</sup> *Id.* ¶ 53.

<sup>340</sup> *Id.* ¶ 46.

<sup>341</sup> *Halpern v. Canada*, [2003] CarswellOnt 2159, ¶ 53 (O.C.A.).

<sup>342</sup> *Id.* ¶ 69.

<sup>343</sup> *Id.* (quoting *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624, 678).

<sup>344</sup> *Id.* ¶ 72.

<sup>345</sup> *Id.* ¶¶ 73–76. It has been recognized that sexual orientation is an analogous ground for discrimination. *Id.*

<sup>346</sup> *Id.* ¶ 77. The Court noted that the next step

requires the Court to determine whether the differential treatment imposes a burden upon, or withholds a benefit from, the claimants in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.

*Id.* As the Court noted, this third stage of the inquiry “is concerned with substantive equality, not formal equality.” *Id.* ¶ 78.

<sup>347</sup> *See Halpern v. Canada*, [2003] CarswellOnt 2159, ¶ 83 (O.C.A.).



discrimination.<sup>348</sup> Finally, the Court noted that the opposite-sex requirement for marriage in the common law does not meet the needs or situation of same-sex couples.<sup>349</sup> Marriage is a fundamental institution and excluding same-sex people from participating perpetuates their subordination.<sup>350</sup> Thus, the Court concluded that “the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage [in violation of] s. 15(1) of the [Canadian Charter].”<sup>351</sup> Finding discrimination, the Court proceeded to determine whether the violation was justifiable under section 1 of the Canadian Charter, which provides a guarantee of the rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,”<sup>352</sup> and concluded that the Attorney General did not show pressing and substantial objectives for excluding same-sex couples from marriage.<sup>353</sup> Although the Court’s findings rendered unnecessary a proportionality analysis,<sup>354</sup> it observed that the objectives for excluding same-sex

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<sup>348</sup> *Id.* ¶ 86.

<sup>349</sup> *Id.* ¶ 95 (noting that “the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of same-sex couples. . . . [a] factor weigh[ing] in favour of a finding of discrimination”).

<sup>350</sup> *Id.* ¶ 107. The Court noted:

In this case, same-sex couples are excluded from a fundamental societal institution—marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. . . . Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

*Id.*

<sup>351</sup> *Id.* ¶ 108.

<sup>352</sup> *Id.* ¶ 109. In engaging the analysis necessary under Section 1, the Court noted that the party wanting to uphold the law has to prove that:

- (1) [t]he objective of the law is pressing and substantial; and
- (2) [t]he means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society. This requires:
  - (A) [t]he rights violation to be rationally connected to the objective of the law;
  - (B) [t]he impugned law to minimally impair the *Charter* guarantee; and
  - (C) [p]roportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right.

*Id.* ¶ 113 (citations omitted). This analytical framework is much like that of the United States, international, and regional decisions discussed previously.

<sup>353</sup> *Halpern v. Canada*, [2003] CarswellOnt 2159, ¶ 125 (O.C.A.).

<sup>354</sup> *Id.* ¶ 141. The Court stated, regarding proportionality:

Since we have already concluded that the objectives are not rationally connected to the opposite-sex requirement of marriage, and the means chosen to achieve the objectives do

couples from marriage were “not rationally connected to the opposite-sex requirement in the common law definition of marriage.”<sup>355</sup> In addition, the Court ruled that total exclusion of same-sex couples from the institution of marriage “cannot constitute minimal impairment.”<sup>356</sup> The exclusion of same-sex couples from marriage effected a violation of the couples’ equality rights under section 15(1) of the Canadian Charter and was not justified under section 1.<sup>357</sup> As a remedy, the Court reformulated “the common law definition of marriage as ‘the voluntary union for life of two persons to the exclusion of all others.’”<sup>358</sup>

The *EGALE Canada Inc. v. Canada* Court followed a similar analysis and reached the same conclusion: “that there is a common law bar to same-sex marriage; that it contravenes s. 15 of the [Canadian] Charter; and that it cannot be justified under s. 1 of the Charter.”<sup>359</sup> Thus, the Court declared that, pursuant to section 52 of the Constitution Act, 1867, the common law prohibition against same-sex marriage “is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the [Canadian] Charter and does not constitute a reasonable and demonstrably justified limit on those rights and freedoms within the meaning of s. 1 of the Charter.”<sup>360</sup> The Court also reformulated “the common law definition of marriage to mean the ‘lawful union of two persons to the exclusion of all others.’”<sup>361</sup> The Court then suspended the relief<sup>362</sup> until July 12, 2004, “solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision.”<sup>363</sup>

The other state that has significant jurisprudence on gay and lesbian rights is South Africa. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (“*National Coalition I*”),<sup>364</sup> the Court analyzed the constitutional validity of various provisions that criminalized sodomy. The Court reviewed the equality guarantees contained in both section 8 of the Interim Constitution of 1993 and section 9 of the 1996 Constitution, which specifically enumerate sexual

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not impair the Couples’ rights as minimally as possible, it is axiomatic that the deleterious effects of the exclusion of same-sex couples from marriage outweigh its objectives.

*Id.*

<sup>355</sup> *Id.* ¶ 132.

<sup>356</sup> *Id.* ¶ 139.

<sup>357</sup> *Id.* ¶ 142.

<sup>358</sup> *Id.* ¶ 154 (citation omitted).

<sup>359</sup> *EGALE Canada Inc. v. Canada*, [2003] CarswellBC 1006, ¶ 7 (B.C.C.A.).

<sup>360</sup> *Id.* ¶ 158 (quoting declaration sought by appellants).

<sup>361</sup> *Id.* ¶ 159.

<sup>362</sup> *Id.* ¶ 161.

<sup>363</sup> *EGALE Canada Inc. v. Canada*, [2003] CarswellBC 1006, ¶ 161 (B.C.C.A.).

<sup>364</sup> *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (SA) [hereinafter *National Coalition I*].

orientation as a prohibited ground for discrimination.<sup>365</sup> Issues of equality were salient because the law targeted only male same-sex conduct.<sup>366</sup> The South African Court's methodological interrogation to evaluate a violation of equality is much like the approaches used by the European Court and the Canadian courts.<sup>367</sup>

In *National Coalition I*, the Court observed that the aim of the equality provision is not to eliminate differences between people, but rather to eliminate the "experience of subordination."<sup>368</sup> "The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives."<sup>369</sup> Specifically,

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<sup>365</sup> *Id.* ¶ 10. Section 8 of the Interim Constitution provides "[e]very person shall have the right to equality before the law and to equal protection of the law [and that] [n]o person shall be unfairly discriminated against, directly or indirectly, . . . on one or more of the following grounds in particular: . . . sexual orientation. . . ." *Id.* Section 9 of the 1996 Constitution provides "[e]veryone is equal before the law and has the right to equal protection and benefit of the law. . . . The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation. . . ." *Id.* The Court then proceeded to analyze the case "on the assumption that the equality jurisprudence and analysis developed by this Court in relation to section 8 of the interim Constitution is applicable to section 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions." *Id.* ¶ 15 (footnote omitted).

<sup>366</sup> *Id.* ¶ 14. The Court noted:

The offence of sodomy, prior to the coming into force of the interim Constitution, was defined as 'unlawful and intentional sexual intercourse per anum between human males,' consent not depriving the act of unlawfulness, 'and thus both parties commit the crime.' Neither anal nor oral sex in private between a consenting adult male and a consenting female was punishable by the criminal law. Nor was any sexual act, in private, between consenting adult females so punishable.

*Id.* (footnotes omitted).

<sup>367</sup> *Id.* ¶ 17(a). First, the Court reviews whether "the provision differentiate[s] between people or categories of people. . . . If so, does [it] bear a rational connection to a legitimate government purpose?" If not, the equality provision is violated. Even if there is a rational reason to differentiate between persons, such differentiation may amount to unfair discrimination, an interrogation that requires a two-step analysis. *Id.* ¶ 17(b). First, the question is whether the differentiation constitutes discrimination. This receives an affirmative answer if the differentiation is based upon enumerated grounds or if it "is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to effect them adversely in a comparably serious manner." *Id.* ¶ 17(b)(i). The second question asks whether it constitutes unfair discrimination. Discrimination on an enumerated ground results in a presumption of unfairness; discrimination on an unspecified ground requires that the claimant establish the unfairness by showing the deleterious impact of the discrimination. *Id.* ¶ 17(b)(ii). If the discrimination is unfair, the State can seek to establish that it is justifiable. *Id.* ¶ 17(c).

<sup>368</sup> *Id.* ¶ 22 (quoting MICHAEL WALZER, *SPHERES OF JUSTICE* xiii (1983)).

<sup>369</sup> *Id.* ¶ 23. The Court continues noting that such discriminatory provisions can cause

the impact of sodomy laws on gay men is to devalue their specifically protected Article 10 right to dignity<sup>370</sup> and deny their equality, personhood, and identity with no purpose other than moral or religious disapprobation.<sup>371</sup> The Court invalidated the common law offense of sodomy as well as various statutory provisions criminalizing sodomy as inconsistent with the Constitution of South Africa.<sup>372</sup>

*National Coalition I* was about much more than simply sodomy. "At a practical and symbolic level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution."<sup>373</sup>

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serious psychological harm for gays. *Id.* In addition, such provisions were viewed as being harmful in other ways beyond the harm to dignity and self esteem, including "legitimate or encourage blackmail, police entrapment, violence ('queer-bashing') and peripheral discrimination, such as refusal of facilities, accommodation and opportunities." *Id.* ¶ 24 (footnote omitted). The Court also noted that the impact of discrimination against gays and lesbians is exacerbated because of their lack of political power. *Id.* ¶ 25.

<sup>370</sup> *National Coalition I*, 1998 (12) BCLR 1517, ¶ 28 (SA). The Court noted:

Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy criminalizes all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, the age of such couple, or the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant portion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offense of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such, it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.

*Id.* (footnote omitted). The Court then emphasized that it found the offense of sodomy unconstitutional "because it breaches the rights of equality, dignity and privacy." *Id.* ¶ 30.

<sup>371</sup> *Id.* ¶ 26(a)–(b). The Court noted that the impact is

severe, affecting the dignity, personhood and identity of gay men at a deep level. . . . The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct that fails to conform with the moral or religious views of a section of society.

*Id.*

<sup>372</sup> *Id.* ¶ 106.

<sup>373</sup> *Id.* ¶ 107.

In acknowledging the relationship between equality and privacy rights, a significant analytical move in light of *Lawrence*, the Court recognized that “it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.”<sup>374</sup> The consequence of such heteronormativity is

that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged. People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do.<sup>375</sup>

The opinion thus recognizes and adopts a realistic and holistic indivisibility perspective, intermingling privacy and equality protections, in order to resoundingly reject subordination of an unpopular group.<sup>376</sup>

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<sup>374</sup> *Id.* ¶ 108.

<sup>375</sup> *Id.* ¶ 109.

<sup>376</sup> *National Coalition I*, 1998 (12) BCLR 1517, ¶ 112 (SA). The Court observed:

The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.

*Id.* (footnote omitted). The Court noted:

One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly. The objective is to determine in a qualitatively rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. . . . Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who have historically suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently among the lowest paid workers.

*Id.* ¶ 113 (footnote omitted). Further, as the case before it showed,

a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights. . . . The group in question is discriminated against because of the one characteristic of sexual orientation. The measures that assail their personhood are

In another ground-breaking case, *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (“*National Coalition II*”),<sup>377</sup> the Court considered whether it was constitutionally valid to facilitate immigration into the state of spouses of permanent residents but not afford the same benefits to gays and lesbians in permanent same-sex life partnerships with South African residents. Again, taking a realistic rather than an abstract approach to discrimination,<sup>378</sup> and an antisubordination approach to equality,<sup>379</sup> the Court

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clustered around this particular personal trait. Yet the impact of these laws on the group is of such a nature that a number of different protected rights are simultaneously infringed. In these circumstances it would be as artificial in law as it would be in life to treat the categories as alternative rather than interactive. . . . Thus, the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people’s lives. The Bill of Rights tells us how we should analyse this interaction: in technical terms, the gross interference with privacy will bear strongly on the unfairness of the discrimination, while the discriminatory manner in which groups are targeted for invasions of privacy will destroy any possibility of justification for such violations.

*Id.* ¶ 114 (footnote omitted). Similarly, Justice Sachs viewed that

the equality principle and the dignity principle should not be seen as competitive but rather as complementary. Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim.

*Id.* ¶ 125 (Sach J., concurring). Justice Sachs continued:

At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness from within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself. . . . In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.

*Id.* ¶ 129 (Sach, J., concurring).

<sup>377</sup> Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs, 2000 (1) BCLR 39 (SA) [hereinafter *National Coalition II*].

<sup>378</sup> *Id.* ¶ 38. The Court noted:

The respondents’ submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.

*Id.*

recognized that gays and lesbians could not marry and thus facilitate their partners' immigration. Following the holistic, indivisibility approach of *National Coalition I*, the Court observed that the discrimination in the case constituted "overlapping or intersecting discrimination on the grounds of sexual orientation and marital status, both being specified in section 9(3) and presumed to constitute unfair discrimination by reason of section 9(5) of the Constitution."<sup>380</sup>

The case recognized "significant pre-existing disadvantage and vulnerability"<sup>381</sup> because it was not disputed that gays and lesbians suffer discrimination which undermines their confidence and sense of self-worth and self-respect. The Court concluded that the section differentiating between spouses and same-sex partners was unconstitutional because it reinforces "harmful and hurtful stereotypes of gays and lesbians,"<sup>382</sup> constituting unjustified<sup>383</sup> and unfair discrimination and a limitation on section 9(3) of the constitution, which protects equality rights of gays and lesbians.<sup>384</sup>

Two other South African cases, both decided in 2002, are noteworthy. In *Satchwell v. South Africa*,<sup>385</sup> the applicant, a judge who is a lesbian in a committed relationship,<sup>386</sup> challenged the laws and regulations<sup>387</sup> governing judicial pay and benefits because some were limited to surviving spouses.<sup>388</sup> Judge Satchwell and her partner could not marry because of South African law. However, they lived in every respect as a married couple<sup>389</sup> and presented

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<sup>379</sup> *Id.* ¶ 35 (stating "'the experience of subordination—of personal subordination, above all—lies behind the vision of equality'" (quoting *National Coalition I*) (footnote omitted)).

<sup>380</sup> *Id.* ¶ 40. In this paragraph, the Court proceeds to quote Justice Sachs's concurrence in the sodomy case (*National Coalition I*) that discriminatory impact is not occurring on isolated matters but on a combination of grounds that are "'globally and contextually, not separately and abstractly.'" *Id.* (citation omitted). The Court also quotes another case to show that discriminations are not mutually exclusive. *Id.*

<sup>381</sup> *Id.* ¶ 44.

<sup>382</sup> *Id.* ¶ 49.

<sup>383</sup> *National Coalition II*, 2000 (1) BCLR 39, ¶¶ 58–59.

<sup>384</sup> *Id.* ¶¶ 57–58 (incorporating the idea of proportionality to balance separate interests to see if the limitation was justified).

<sup>385</sup> *Satchwell v. South Africa*, 2002 (9) BCLR 986 (SA).

<sup>386</sup> *Id.* ¶ 4. Judge Satchwell stated "that she and Ms Lesley Louise Carmelley have been involved in an intimate, committed, exclusive and permanent relationship since about 1986." *Id.*

<sup>387</sup> *Id.* ¶ 3 ("challeng[ing] the constitutional validity of provisions of Sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 and...the Regulations in respect of Judges Administrative Recesses, Leave, Transport and Allowances in respect of Transport, Travelling and Subsistence").

<sup>388</sup> *Id.* ¶ 7. The challenged provisions provide for paying of benefits to a "surviving spouse of a deceased judge." *Id.*

<sup>389</sup> *Id.* ¶ 4.

evidence of “their emotional and financial inter-dependence.”<sup>390</sup> Judge Satchwell applied for a decision of unconstitutionality in the Pretoria High Court<sup>391</sup> to have the act and regulations amended so that her partner would be entitled to the benefits that spouses of judges receive.<sup>392</sup> The Pretoria High Court ruled in the judge’s favor; the Constitutional Court confirmed the Pretoria High Court order.<sup>393</sup>

Having ruled that the word “spouse” could not be interpreted to include a same-sex partner,<sup>394</sup> the issue in *Satchwell* was whether a partner should be entitled to spousal benefits.<sup>395</sup> The Court, having recognized different forms of life partnerships,<sup>396</sup> and acknowledging that certain traditional societies recognize woman-to-woman marriages,<sup>397</sup> observed that “[s]ame-sex partners cannot be lumped together with unmarried heterosexual partners” because same-sex partners cannot enter into a valid marriage.<sup>398</sup> The Court concluded that the provisions in question constituted unjustifiable unfair discrimination.<sup>399</sup> The Court affirmed the High Court’s “reading in the words ‘or partner or in a permanent same-sex life partnership’” to limit the constitutional wrong, but added that in order to be entitled to benefits such partners must have undertaken and committed themselves to reciprocal duties of support.<sup>400</sup>

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<sup>390</sup> *Id.* ¶ 5. The interdependence included having mutual wills, owning joint property in which they live, and having the judge’s partner listed as the beneficiary of her insurance and other investments as well as her dependent. *Id.*

<sup>391</sup> *Satchwell v. South Africa*, 2002 (9) BCLR 986, ¶ 8 (SA). To this end, she engaged in correspondence with the Minister of Justice and Constitutional Development who, although conceding that the provisions were discriminatory, and committing to uphold constitutional principles by removing the discrimination, asked for Judge Satchwell’s patience. *Id.* However, after two years of no change, she instituted a court challenge. *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* ¶ 2. The Constitution provides that a High Court’s decision of constitutional invalidity has no force or effect until it has been confirmed. *Id.*

<sup>394</sup> *Id.* ¶ 9 (citation omitted).

<sup>395</sup> *Id.* (asking “whether the claim by the applicant that Ms Carnelley should be entitled to the benefits enjoyed by the spouses of judges under the Act should be sustained”).

<sup>396</sup> *Id.* ¶ 12 (citation omitted).

<sup>397</sup> *Satchwell v. South Africa*, 2002 (9) BCLR 986, ¶ 12 (footnote omitted).

<sup>398</sup> *Id.* ¶ 16.

<sup>399</sup> *Id.* ¶¶ 23, 26.

<sup>400</sup> *Id.* ¶ 34. Subsequent to this judgment and following notification that Act 88 of 1989 and attendant regulations (of 1995) had been replaced by Act 47 of 2001 and new attendant regulations (of 2002), Judge Satchwell again appealed to the Court. *Satchwell v. South Africa*, 2004 (1) BCLR 1, ¶ 2 (SA). The Court noted that, as the replacements still afforded benefits only to spouses of judges and not to permanent same-sex life partners, the effect was that Satchwell did not gain any effective relief from the judgment in 2002. *Id.* Thus, the Court ordered that the phrase “or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” be added after the word “spouse” in both



The other 2002 South African case of note is *Du Toit v. Minister for Welfare and Population Development*,<sup>401</sup> a case in which two lesbians<sup>402</sup> challenged the law that restricted joint adoption of children to married couples.<sup>403</sup> After only one of the applicants was awarded custody and guardianship,<sup>404</sup> although both had been deemed suitable parents, the couple challenged the legislation's constitutional validity in the Pretoria High Court on the grounds that it denied their rights to equality and dignity.<sup>405</sup> The Pretoria High Court found constitutional violations, and the case went before the Constitutional Court for confirmation.<sup>406</sup>

In contrast to the *Fretté* decision of the European Court and the *Lofton* decision of the United States Court of Appeals for the Eleventh Circuit, the South African Constitutional Court concluded that excluding same-sex life partners from jointly adopting children violates section 28(2) of the Constitution by depriving children of the possibility of a loving and stable family as required by that constitutional provision.<sup>407</sup> The provisions differentiated unfairly and unjustifiably on the grounds of sexual orientation and marital status, both of which are protected grounds against discrimination in section 9(3) of the Constitution.<sup>408</sup> The Court also found that the provisions violated Ms. Du Toit's dignitary rights as protected in section 10 of the Constitution.<sup>409</sup> Thus, the Court confirmed the order of the Pretoria High Court, declaring the discriminating provisions invalid as well as reading language into the permanent statutory provisions to cure the defect.<sup>410</sup>

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Act 47 of 2001 and its attendant regulations. *Id.* ¶ 14.

<sup>401</sup> *Du Toit v. Minister for Welfare and Population Dev.*, 2002 (10) BCLR 1006 (SA).

<sup>402</sup> *Id.* ¶ 4. The applicants had lived together as life partners since 1989 and lived as a couple sharing property, jointly utilizing financial resources, having joint wills, being beneficiaries of each other's insurance policies, and making joint life decisions. *Id.*

<sup>403</sup> *Id.* ¶ 2.

<sup>404</sup> *Id.* ¶¶ 1, 5, 6 & 14. In 1994, the couple had approached authorities to be screened as prospective adoptive parents and went through a standard process to determine their suitability as parents of adopted children. *Id.* ¶ 5. Following approval and acceptance as adoptive parents, they identified a sister and brother born in 1988 and 1992 respectively for possible adoption and, in December of 1994, the children were placed temporarily in their care, in whose care the children remain. *Id.* ¶ 6. Because of the existing law, the women are forbidden from jointly adopting these children, which means that the nonadoptive parent, Ms. Du Toit, cannot have legal guardianship, although she is the primary source of the emotional support within the family. *Id.* ¶ 14.

<sup>405</sup> *Id.* ¶¶ 2 & 7.

<sup>406</sup> *Id.* ¶ 2.

<sup>407</sup> *Du Toit v. Minister for Welfare and Population Dev.*, 2002 (10) BCLR 1006, ¶ 22.

<sup>408</sup> *Id.* ¶¶ 23, 26.

<sup>409</sup> *See id.* ¶ 29.

<sup>410</sup> *See id.* ¶ 44.

### C. Comparative Observations

In this section, I want to explore briefly the methodological and substantive similarities and differences between the domestic and transnational approaches to rights analysis. International and regional legal protections expressly identify privacy and family as two locations of rights.<sup>411</sup> By contrast, in the U.S. domestic realm, general privacy protections, as well as specific protections for the family, are unenumerated rights that emerge from the substantive Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>412</sup>

Both international and regional documents as well as the Fourteenth Amendment of the U.S. Constitution expressly provide for equal protection of the laws.<sup>413</sup> The Fifth Amendment does not have such an express provision, but it

<sup>411</sup> *ICCPR*, *supra* note 11, art. 17(1) (providing “[n]o one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”); *id.* art. 23(1) (stating “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”); *see also International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., art. 10(1) (1966) (setting forth “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”); *European Convention*, *supra* note 12, art. 8 (providing that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”); *Universal Declaration*, *supra* note 10.

<sup>412</sup> U.S. CONST. amend. V, XIV; *see also supra* notes 28–32 and accompanying text.

<sup>413</sup> U.S. CONST. amend. XIV; *see also Universal Declaration*, *supra* note 10, art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *ICCPR*, *supra* note 11, part II, art. 2 (1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *International Covenant on Economic, Social and Cultural Rights*, *adopted* Dec. 16, 1966, part II, art. 2 (2), 993 U.N.T.S. 3 (providing that “[t]he States Parties to the Present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *African Charter on Human and People’s Rights (Banjul Charter)*, 21 I.L.M. 59, *entered into force* October 21, 1986, part I, chapter I, art. 2 (stating that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”); *American Convention on Human Rights*, *entered into force* July 18, 1978, part I, chapter I, art. 1(1), 9 I.L.M. 673.

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without discrimination for reasons of race, color,

has been interpreted as having an equal protection component that prohibits the United States from invidiously discriminating between individuals or groups.<sup>414</sup>

Although both international and U.S. domestic law have express equal protection provisions, the international and regional legal provisions' protections have a wider reach, extending not only to race, color, sex, religion, and national origin, but also to language, political or other opinion, social origin, property, and birth or other status.<sup>415</sup> In contrast to U.S. jurisprudence, in the international and regional realms the protection against discrimination on the basis of sex has been interpreted to extend to sexual orientation.<sup>416</sup> South Africa is exceptional in expressly listing sexual orientation as a prohibited basis of discrimination.<sup>417</sup> In addition to providing a longer list of protected rights, in the transnational realm more classifications enjoy heightened protections than in the United States, where high levels of scrutiny are allowed only with respect to national, religious, or racial classifications.<sup>418</sup> Sex, which does not include sexual orientation, receives a mid-level scrutiny,<sup>419</sup> and other social and economic classifications receive only rational basis of review.<sup>420</sup>

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sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

*Id.*

<sup>414</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (providing that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)); *see also* *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975).

[While] the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. . . . This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.

*Id.* (citations omitted).

<sup>415</sup> *See supra* note 413.

<sup>416</sup> *See supra* notes 162–70, 175–89 and accompanying text.

<sup>417</sup> S. AFR. CONST. (Act 108 of 1996, *as adopted on 8 May 1996 and amended on 11 October 1996* by the Constitutional Assembly) ch. II, § 9 (Equality) para. 3 (providing that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.")

<sup>418</sup> *See generally* CHEMERINSKY, *supra* note 96, at 668–69.

<sup>419</sup> *See infra* notes 629, 631. *See generally* CHEMERINSKY, *supra* note 96, at 721.

<sup>420</sup> *Dandridge v. Williams*, 397 U.S. 471 (1970) (addressing the issue of the validity of the Social Security Act of 1935). With regard to benefits for families receiving aid under the Aid to Families with Dependent Children, the Court held

[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply

Methodologically, there are both similarities and differences in the transnational and the U.S. domestic approaches to the analysis of rights. In the United States, the first level of interrogation is whether a protected right exists and, if so, whether it is a fundamental one.<sup>421</sup> If the right is not fundamental, it will require only a rational basis of review; if it is fundamental, it will require strict scrutiny under both due process and equal protection standards. The second level of interrogation is an analysis of whether there has been an infringement on the right.<sup>422</sup> If so, the next stage in the inquiry seeks to ascertain whether the government has provided a sufficient justification for the infringement. If the right is fundamental, the government has to present a compelling state interest to justify the infringement; if it is not, only a legitimate purpose needs to be established for the law to be upheld.<sup>423</sup> Finally, the last level of inquiry is whether the means used by the government is sufficiently related to the governmental aims for the legislation. Here, again, under strict scrutiny of fundamental rights, the government needs not only to prove a compelling purpose behind the law, but must also show that the law is necessary to achieve the desired objective.<sup>424</sup> By contrast, the rational basis review requires only that the government show that it used a reasonable means to attain its goal; thus, the rational basis test does not require the least restrictive alternative.<sup>425</sup>

The methodological structure of the analysis of the cases in international or

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because the classification “is not made with mathematical nicety or because in practice it results in some inequality.”

*Id.* at 485 (citations omitted); *see also* *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103 (2003). In deciding whether a differential tax in Iowa was constitutional, the court noted

“[t]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship to the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”

*Id.* at 107 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

<sup>421</sup> *See generally* CHEMERINSKY, *supra* note 96.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Fitzgerald*, 539 U.S. at 107; *see also* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). When reaching its conclusion that the statute was not violative of the Equal Protection Clause, the Court said

[t]his Court has made clear that a legislature need not “strike at all evils at the same time or in the same way” . . . and that a legislature “may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.”

*Id.* at 466 (citations omitted).

regional contexts as well as the foreign contexts is very similar. For example, under the European System privacy is an expressly protected right.<sup>426</sup> Article 8 of the European Convention provides that the government can interfere with that right if it is (1) pursuant to law, (2) has a legitimate aim, and (3) is necessary in a democratic society.<sup>427</sup> To be necessary in a democratic society, the regulation must answer a pressing social need and must be proportionate to the legitimate aim being pursued.<sup>428</sup> To establish proportionality, the justifications for retaining the law must outweigh its detrimental effects. States enjoy a “margin of appreciation” which provides some flexibility for the different communities to enact laws according to their traditions.<sup>429</sup> However, the margin of appreciation depends on both the aim of the restriction and the nature of the activities involved.<sup>430</sup> For example, with conduct that concerns intimate aspects of private life, particularly serious reasons must exist before the interference with the right is deemed legitimate.<sup>431</sup> Similar to the analysis under U.S. law, this process, in looking at the nature of rights, differentiates between the importance of the rights.

Thus, it seems that, at least structurally, the methodologies applied in both the domestic U.S. analysis on the one hand and the international, regional, and foreign fora on the other are quite similar. Adjudicators look for the existence of a right, whether it has been denied, the nature of the right, the reasons for the denial, and the justifiability of the reasons for the denial. However, the general approach to rights is different. The U.S. Supreme Court takes a monocular approach to rights,<sup>432</sup> seeking to ground the decision in each case by focusing on only the violation of one right.<sup>433</sup> In contrast, the transnational bodies consider rights violations in a more holistic manner, recognizing the interrelatedness and

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<sup>426</sup> See *supra* Part II.B.2.

<sup>427</sup> The “necessary in a democratic society” provision has four specific categories: “[a)] in the interests of national security, public safety or the economic well-being of the country; (b)] for the prevention of disorder or crime; (c)] for the protection of health or morals; or [(d)] for the protection of the rights and freedoms of others.” European Convention, *supra* note 12, art. 8.

<sup>428</sup> *Id.*

<sup>429</sup> See *supra* note 231.

<sup>430</sup> See *supra* note 231.

<sup>431</sup> See *supra* note 231.

<sup>432</sup> The Court considers only one right at a time and renders decisions based on one right’s violation, even when in different opinions it has invalidated laws restricting similar conduct on different grounds. See *supra* notes 45–53 and accompanying text (noting that courts have invalidated laws restricting access to contraceptives, both as violating equal protection and infringing on the right to privacy).

<sup>433</sup> For a critique of this approach as not realistic because the Equal Protection and Due Process Clauses in fact have a “bi-directional” relationship, see Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002).

indivisibility of rights. For example, the Human Rights Committee, the European Court, Canadian courts, and the South African Constitutional Court all viewed the privacy and equality provisions as working in an indivisible manner.<sup>434</sup> This holistic approach, particularly in the evident interplay of equality and due process rights, is more realistic and effective as it reflects the complexity not only of the law, but of people's lives.

### III. THE CASE—A QUESTION OF COHERENCE

The *Lawrence* case is unusual because, while it is a legal landmark, it is grounded on hugely limited information. The case provides us with few details of events leading up to the petitioners' arrests and with even less information about them as people. The following is the entirety of the factual statement in the Supreme Court opinion:

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapon disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyrone Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex with a member of the same sex (man)." . . .<sup>435</sup>

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined \$200 and assessed court costs of \$141.25.

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The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.<sup>436</sup>

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<sup>434</sup> See *supra* Part II.B.

<sup>435</sup> *Lawrence v. Texas*, 539 U.S. 558, 562–63 (2002) The Court stated:

The applicable state law is *Tex. Penal Code Ann. § 21.06(a) (2003)*. It provides: "a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual intercourse" as follows: (A) any contact between any part of the genitals of one person in the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

*Id.* at 563.

<sup>436</sup> *Id.* at 564 (citations omitted).

The story thereafter was simple. The State Court of Appeals, using *Bowers v. Hardwick*<sup>437</sup> as controlling precedent, rejected the petitioners' federal equal protection and due process challenges and affirmed the convictions.<sup>438</sup> The U.S. Supreme Court granted certiorari to decide the constitutional question,<sup>439</sup> and ruled that the Texas statute indeed constituted an unconstitutional infringement on the petitioners' rights.<sup>440</sup> Sections A and B below, respectively, will detail the substance of the majority opinion and the dissent.

### A. *The Majority Decision*

#### 1. *Justice Kennedy and Liberty*

Justice Kennedy, writing for the majority, set the tone and context for the decision in the first paragraph of the opinion:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person in both in its spatial and more transcendent dimensions.<sup>441</sup>

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<sup>437</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>438</sup> *Lawrence*, 539 U.S. at 563.

<sup>439</sup> *Id.* at 564.

<sup>440</sup> *Id.* at 578.

<sup>441</sup> *Id.* at 562. This analysis of liberty echoes the argument presented in the amici curiae brief of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interrights, The Lawyers' Committee for Human Rights, and Minnesota Advocates of Human Rights in support of petitioners. Brief of Amici Curiae Mary Robinson et al. at 9, *Lawrence v. Texas*, 539 U.S. 558 (2002) (No. 02-102). Both international and domestic precedent support the invalidation of the Texas statute based on concepts of decisional privacy, i.e., the right to make intimate, personal choices. *Id.* Relational privacy, establishes that "adult consensual same-sex sexual activity [should] be protected by the right to privacy," regardless of connection to family, marriage or procreation while noting that some precedent recognizes there can be "a familial dimension to same-sex relationships." *Id.* at 14. Zonal privacy interpretation "gives heightened protection to activities that occur within the home." *Id.* at 15. Interestingly, a recent article critiques the *Lawrence* decision because it "domesticate[s]" liberty. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400, 1403-04 (2004). This would seem to recognize only the zonal privacy alluded to in the brief and would ignore Justice Kennedy's express statement that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." *Lawrence*,

Providing this framework, which situates the breadth of matters embraced by the liberty interest, Justice Kennedy articulated the issue as “the validity of a Texas statute making it a crime for two people of the same sex to engage in certain intimate sexual conduct.”<sup>442</sup> This articulation is dramatically different from the articulation in *Bowers*, which just seventeen years earlier had asked “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .”<sup>443</sup> And in contrast with Justice Kennedy’s inclusion of the diverse geographies in which gays and lesbians experience life—in the home and beyond—*Bowers* had immediately marginalized gays by stating early on in the opinion that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”<sup>444</sup>

Given these clearly divergent etiological stances,<sup>445</sup> it was not surprising that the Court reconsidered *Bowers*. In *Bowers* and *Lawrence*, the facts were similar, but the statutes were different.<sup>446</sup> Significantly, however, the *Lawrence* Court (like the South African courts) was sensitive to the degrading nature of the *Bowers* formulation: “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>447</sup> This humanistic approach frames the Court’s consideration of the “spatial and more transcendent dimensions”<sup>448</sup> of liberty, and enables it to acknowledge that although the laws at issue in both *Lawrence* and *Bowers* claim to proscribe only certain sexual conduct, their impact effects a serious intrusion into the liberty interest protection of the home and of intimate conduct and relations.<sup>449</sup>

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539 U.S. at 562.

<sup>442</sup> *Lawrence*, 539 U.S. at 562.

<sup>443</sup> *Bowers v. Hardwick*, 478 U.S.186, 190 (1986).

<sup>444</sup> *Id.* at 191.

<sup>445</sup> *Lawrence*, 539 U.S. at 564 (asking “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution”).

<sup>446</sup> *Id.* at 566 (noting that while the Texas statute prohibited only same sex conduct, the Georgia statute prohibited conduct regardless of the sex of the participants). The Court also cited to precedent that framed the liberty interest including *Pierce*, *Meyer*, and *Griswold* and its progeny. *Id.* at 564. In addition, the Court noted the procedural differences in the stances of the cases. *Id.* at 566.

<sup>447</sup> *Id.* at 567.

<sup>448</sup> *Id.* at 562.

<sup>449</sup> *Id.* at 567. The Court observed that while the laws

purport to do no more than prohibit a particular sexual act[, t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the



Underscoring the indivisible nature of the relational and zonal interference with liberty, the Court:

counsel[ed] against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free people. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual people the right to make this choice.<sup>450</sup>

To satisfy the due process requirement, the Court engaged in an historical analysis, including a review of international sources, to examine whether, as *Bowers* had held, sodomy prohibitions are deeply grounded in tradition. The Court concluded that same-sex sodomy prohibitions were of recent construction.<sup>451</sup> Contrary to *Bowers*' insinuation about historical cultural abhorrence for same-sex contact, early sodomy laws, aside from not being same-sex specific, were intended to protect minors or to prohibit such conduct in public.<sup>452</sup> The historical perspectives of the *Bowers* and *Lawrence* Courts were dramatically divergent. In *Bowers* the Court looked back, noting that prior to 1961 all fifty states in the United States had outlawed sodomy and at the time of the decision twenty-four states and the District of Columbia still had sodomy laws.<sup>453</sup> The *Lawrence* Court instead looked forward, noting since *Bowers* the number of sodomy prohibitions shrank from twenty-five to thirteen, of which four targeted only same-sex conduct and none of which was regularly enforced.<sup>454</sup>

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law, is within the liberty of persons to choose without being punished as criminals.

*Id.* It is noteworthy that the Court in these statements embraced the decisional aspect of privacy—the right to enter into the conduct, relational privacy—acknowledging the statutes' attempt to control a personal relationship, and zonal privacy—the statutes' reaching into the home.

<sup>450</sup> *Id.* This paragraph also elucidates on the decisional ("right to make this choice") and zonal ("confines of their homes") nature of the privacy the Court is addressing.

<sup>451</sup> *Lawrence v. Texas*, 539 U.S. 558, 570 (2002) (finding that "[i]t was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so").

<sup>452</sup> *Id.* at 569 ("A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor . . ."); see also Brief of Amici Curaie Cato Institute at 9, *Lawrence v. Texas*, 539 U.S. 558 (2002) (No. 02-102).

<sup>453</sup> *Lawrence*, 539 U.S. at 572.

<sup>454</sup> *Id.* at 573. The Court noted:

The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision

Moreover, two post-*Bowers* decisions—*Casey* and *Romer*—“cast [the *Bowers*] holding into even more doubt.”<sup>455</sup> The Court relied on *Casey* (a privacy case) to elucidate the role of liberty in personal decision-making.<sup>456</sup> Quoting *Casey*, in a passage that Justice Scalia derisively refers to as “its famed sweet-mystery-of-life passage,”<sup>457</sup> the Court recognized that

[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>458</sup>

Invoking the “sameness” paradigm in equality jurisprudence, the Court concluded that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>459</sup> On the other hand, the Court used *Romer* (an equal protection case) to call to mind the irrationality of a law directed only at a discrete group and to adopt an antisubordination approach to establish the constitutional invalidity of laws targeting unpopular groups.<sup>460</sup>

The equal protection challenge was “tenable”<sup>461</sup> but insufficient as an analytical framework for two reasons. One, the Court wanted to address the continued viability of *Bowers*. Two, it did not want to leave open the question of the validity of sodomy laws targeted at both same-sex and opposite-sex couples.<sup>462</sup>

The *Lawrence* Court’s use of the liberty interest affects a move to recognize the indivisible nature of the rights to liberty and equality.<sup>463</sup> In reality, when

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are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.

*Id.*

<sup>455</sup> *Id.* Justice Kennedy noted “[t]he foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*.” *Id.* at 576.

<sup>456</sup> *Id.* at 573–74.

<sup>457</sup> *Id.* at 588 (Scalia, J., dissenting).

<sup>458</sup> *Id.* at 574 (2002) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>459</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2002).

<sup>460</sup> *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)) (establishing that the statute was invalid because it “was ‘born of animosity toward the class of persons affected’ and . . . had no rational relation to a legitimate government purpose”).

<sup>461</sup> *Id.* at 574.

<sup>462</sup> *Id.* at 575.

<sup>463</sup> *Id.* (stating that “equality of treatment” and the liberty interest protected by the Due

conduct is made criminal, it stigmatizes people; it becomes “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>464</sup>

Any past tradition regarding condemnation of homosexuality has been discarded;<sup>465</sup> the liberty right “has been accepted as an integral part of human freedom in many other countries,”<sup>466</sup> and the United States has not shown that its governmental interest is greater than in states that have held differently from *Bowers*. While *stare decisis* is a doctrine “essential to the respect accorded to the judgments of the Court and to the stability of the law[, it] is not, however, an inexorable command.”<sup>467</sup> Thus, the Court concluded that “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”<sup>468</sup> Morality cannot be the sole basis to support a law that deeply infringes on personal liberty.<sup>469</sup> Adults have a liberty interest in being free from governmental intrusion with consensual, noncommercial, private sexual conduct.<sup>470</sup> Because the

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Process Clause “are linked in important respects, and a decision on the latter point advances both interests”).

<sup>464</sup> *Id.* at 575. This is a significant passage because the criminalization of sodomy, and the “stigma” attached to it, including the imputation of criminality in a more general basis on persons simply for being gay or lesbian, has resulted in broader based discrimination such as in denial of custody of children, employment discrimination in both the private and the public spheres, and even the possibility that persons will have to register as sex offenders. See *Lawrence*, 539 U.S. at 575 (sex offenders); Bruce D. Gill, Comment, *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361 (2001) (custody); see also Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

<sup>465</sup> *Lawrence v. Texas*, 539 U.S. 558, 576 (2002) (noting that “[t]o the extent that *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere”).

<sup>466</sup> *Id.* at 577.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 578. The Court, in reaching the decision to overrule, acknowledged that liberty interests caution against overruling precedent, but found that the *Bowers* ruling had not been the basis for “individual or societal reliance . . . that could counsel against overturning its holding once there are compelling reasons to do so.” *Id.* at 577.

<sup>469</sup> *Id.* at 577–78 (concluding that a perception of a practice as immoral is insufficient for upholding a law that proscribes the practice and that personal decisions with respect to intimate conduct by both married and unmarried persons are protected by the liberty clause of the Fourteenth Amendment).

<sup>470</sup> *Id.* at 578. The Court observed:

The [] case does not involve minors . . . [or] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged

Texas law furthered no legitimate state interest that justified the infringement into the personal and private life of individuals, the Court invalidated the same-sex sodomy prohibitions.<sup>471</sup>

## 2. Justice O'Connor and Equality

Justice O'Connor concurred in the judgment, but rejected the liberty analysis in favor of an equal protection analysis that would have kept *Bowers* in place.<sup>472</sup> Because the Texas law brands "all homosexuals as criminals," the question under the Equal Protection Clause is "whether . . . moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy."<sup>473</sup> The Texas statute treats the same conduct differently based upon the identity of the participants, "mak[ing] homosexuals unequal in the eyes of the law."<sup>474</sup> Although the punishment might be "minor," the consequences of conviction, which may include exclusion from certain occupations as well as potential labeling as a sex offender, are not.<sup>475</sup>

Thus, Justice O'Connor concluded that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause."<sup>476</sup> She reiterated the holding in *Romer* that it is illegitimate to impose a disadvantage based on "animosity toward the class of persons affected."<sup>477</sup> Significantly, while finding the Texas statute unconstitutional under the Equal Protection Clause, Justice O'Connor emphatically stated that this conclusion does not signify that other distinctions between gays and lesbians on the one hand and heterosexuals on the other hand, such as laws intended to protect "the traditional institution of marriage," might not similarly fail.<sup>478</sup>

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in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

*Id.*

<sup>471</sup> *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2002).

<sup>472</sup> *Id.* (O'Connor, J., concurring) (plainly stating "I joined *Bowers* and do not join the Court in overruling it").

<sup>473</sup> *Id.* at 582 (O'Connor, J., concurring).

<sup>474</sup> *Id.* at 581 (O'Connor, J., concurring).

<sup>475</sup> *Id.* (O'Connor, J., concurring).

<sup>476</sup> *Id.* at 583 (O'Connor, J., concurring).

<sup>477</sup> *Lawrence v. Texas*, 539 U.S. 558, 583 (2002) (O'Connor, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

<sup>478</sup> *Id.* at 585 (O'Connor, J., concurring).

### 3. Critical Observations

The analytical framework for *Lawrence* is noteworthy. Having expressly articulated the interest at issue as a liberty interest, the Court grounded its analysis in the context of an enumerated right in the Due Process Clause rather than on a “penumbral”—thus more elusive—privacy paradigm. Consequently, although the Court used the privacy precedent of *Griswold* and its progeny, it focused on the liberty interest and its protection of people from unwarranted government intrusions. Moreover, the Court addressed the liberty guarantee in the context of freedom from government intrusion into a dwelling or other private places, as well as in “other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.”<sup>479</sup> From the outset, the Court observed that liberty embraces geography, such as the home, but is broader than (and not simply coextensive with) geography as it reaches the “transcendent”—decisional and relational—dimensions of people’s lives.

The Court’s focal point was on the state’s reason for the regulation rather than on the classification of the right as fundamental. This approach acknowledges that the judiciary will defer to the legislature absent discrimination against an identifiably “discrete and insular minority,”<sup>480</sup> such as the homosexuals singled out by the Texas statute in *Lawrence*. Once the Court made this initial move concerning the infringement by Texas of an enumerated liberty interest against a minority group, it concluded that the proffered governmental justification for the infringement of the right—the state’s desire to promote traditional morality—is not a sufficient justification to intervene with the constitutional interest.<sup>481</sup>

The tone of Justice Kennedy’s opinion brings into the due process analysis an antisubordination idea that footnote 4 in *Carolene Products* suggests deserves heightened protection. The *Lawrence* majority, as well as O’Connor’s concurrence, much like the transnational decisions, recognized the damaging consequences of the law. These harms are both real and practical, such as possible disqualification from or restriction of the ability to engage in a number of professions and the possibility of having to register as sexual offenders.<sup>482</sup> The injuries are also psychological, such as the permanent stigma petitioners will bear from having criminal convictions on their record and the dignitary damage that causes.

To be sure, although couched in an equal protection rather than due process

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<sup>479</sup> *Id.* at 562.

<sup>480</sup> *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1937).

<sup>481</sup> *Lawrence*, 539 U.S. at 578 (concluding that consenting adults’ “right to liberty under the Due Process Clause gives them the full right to engage in their [private sexual] conduct without intervention of the government”).

<sup>482</sup> *Id.* at 581.

framework, Justice O'Connor's analytical approach resembled that of the majority. Neither focused on the categorization of the class; rather, both focused on the government's justification for the infringement. She, like the majority, suggested that heightened review might be appropriate.<sup>483</sup> Like the majority, Justice O'Connor rejected Texas's articulated interest to promote morality as sufficient justification for the law. Justice O'Connor, much like the Kennedy majority, concluded that moral disapproval<sup>484</sup> is insufficient justification for the law and that the case warrants a "more searching" form of rational basis review, and emphasized that moral disapproval alone is not a sufficient justification for a law that discriminates among groups of people and picks on an "unpopular" group.<sup>485</sup> These similarities speak not only to the outcome, but I suggest they speak to the methodology that implicitly recognizes, like the transnational authorities do, the interrelatedness of the equality and liberty interests.

## B. *Scalia's Dissent*

### 1. *The Substance*

Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent, which is nine pages longer than the majority opinion. Interestingly, the dissent commences with two moves that parallel the majority's opinion: one, it starts with the same word—"liberty"; two, its first focus is a review of precedent. The substance of the analysis could not be more different, however.

The dissent started by quoting *Casey*: "[l]iberty finds no refuge in a jurisprudence of doubt."<sup>486</sup> Observing that the quote is the language used by the Court in refusing to overrule *Roe* in *Casey*, a case that came nineteen years after *Roe*, the dissent mocked the majority for caving in to "a [seventeen]-year crusade to overrule *Bowers v. Hardwick*."<sup>487</sup> The dissent derided how, unlike the *Casey*

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<sup>483</sup> *Id.* at 580 (O'Connor, J., concurring) (providing "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause") (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>484</sup> *Id.* at 582 (O'Connor, J., concurring) (noting that "moral disapproval is [not] a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy").

<sup>485</sup> *Id.* at 580 (O'Connor, J., concurring).

<sup>486</sup> *Id.* at 586 (Scalia, J., dissenting) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992)).

<sup>487</sup> *Lawrence v. Texas*, 539 U.S. 558, 586 (2002) (Scalia, J., dissenting) (citations omitted).

context, in *Lawrence* “[t]he need for stability and certainty presents no barrier.”<sup>488</sup>

Ignoring the majority’s ruling that *Bowers* was incorrectly decided, and that, in any case, *Bowers* had improperly articulated the issue, the dissent appears to insist that *Bowers*’ holding is not disrupted by *Lawrence*.<sup>489</sup> The dissent engaged in a lengthy discussion about the value of precedent, expressed concern about the erosion of stability effected by the majority’s approach, and concluded that the overruling of *Bowers* entails “a massive disruption of the current social order.”<sup>490</sup> The massive disruption to which Justice Scalia referred is crafted by his vision that the decision in *Lawrence* translates to the imminent invalidation of other morals laws such as “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”<sup>491</sup>

Concluding that the majority treats the idea of “deference to precedent” as nothing but a “result-oriented expedient,”<sup>492</sup> the dissent reviewed the constitutionality of the Texas statute. Because the Fourteenth Amendment allows the deprivation of liberty so long as due process guarantees are observed, and only fundamental liberty interests that are “deeply rooted in this [n]ation’s history and tradition”<sup>493</sup> warrant strict scrutiny review; the statutory review calls only for a rational basis analysis. Based on *Bowers*, Texas’s desire to ban sexual behavior that it (and its citizens) considered immoral and unacceptable was a legitimate state interest that satisfied the requisite level of analysis.<sup>494</sup>

The dissent leveled numerous criticisms of the majority opinion. First, it questioned the use of the *Griswold* line of cases, as *Griswold*’s right to privacy was grounded on penumbras of constitutional provisions “other than the Due Process Clause.”<sup>495</sup> Second, it challenged the majority’s approach to the “history and tradition”<sup>496</sup> component of due process analyses. Because sodomy had been a criminal offense for a long time, a state is justified in retaining such a

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<sup>488</sup> *Id.* (Scalia, J., dissenting).

<sup>489</sup> *Id.* (Scalia, J., dissenting) (providing that “nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right’”).

<sup>490</sup> *Id.* at 591 (Scalia, J., dissenting). Justice Scalia contrasted this massive disruption to the impact of the overruling of *Roe* “which would simply have restored the regime that existed for centuries before 1973.” *Id.*

<sup>491</sup> *Id.* at 590 (Scalia, J., dissenting).

<sup>492</sup> *Id.* at 592 (Scalia, J., dissenting).

<sup>493</sup> *Lawrence v. Texas*, 539 U.S. 558, 593 (2002) (Scalia, J., dissenting) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997)).

<sup>494</sup> *Id.* (Scalia, J., dissenting).

<sup>495</sup> *Id.* at 595 (Scalia, J., dissenting).

<sup>496</sup> *Id.* at 597 (Scalia, J., dissenting) (emphasizing that the reality that homosexual sodomy is not a fundamental right “‘deeply rooted in this [n]ation’s history and tradition’ is utterly unassailable”).

proscription. In addition, seemingly challenging the zonal privacy aspect of the opinion, the dissent questioned “what ‘acting in private’ means,”<sup>497</sup> and noted that the state’s powers properly reach criminal conduct, even when occurring in private.<sup>498</sup> Because “an emerging awareness” that constitutional liberty interests allow people flexibility on how to run their private lives “in matters pertaining to sex”<sup>499</sup> cannot be rooted deeply in tradition and history,<sup>500</sup> and because views of a “wider civilization” are irrelevant,<sup>501</sup> the dissent concluded that the Texas law furthers a legitimate state interest in condemning conduct that it viewed as immoral and unacceptable.<sup>502</sup>

The statute does not violate the Equal Protection Clause as the statute on its face “applies equally to all persons.”<sup>503</sup> Antimiscegenation laws appropriately utilize strict scrutiny because the Virginia statutes’ design was to maintain white supremacy—a racially discriminatory purpose reviewable under a more stringent test.<sup>504</sup> In contrast, as the Texas sodomy laws do not discriminate between the sexes, the dissent concluded that a rational basis of review was appropriate,<sup>505</sup> rejected Justice O’Connor’s heightened review analysis,<sup>506</sup> and posited that even if the Texas law specifically targeted “homosexuals as a class,” just as if it targeted nudists, it would still receive little scrutiny.<sup>507</sup> Otherwise, laws aimed at unpopular groups would be found “invalid *even though* there may be a conceivable rational basis to support them.”<sup>508</sup> Such reasoning would “leave on pretty shaky grounds” regulations against same-sex marriages as such are only evidence of “the State’s *moral disapproval* of same-sex couples”<sup>509</sup>—much the same sentiment expressed by the Texas anti-sodomy law.

The culture-shifting potential of the *Lawrence* decision is patent in the dissent’s chagrin that the opinion, rather than grounded on law, “is the product of

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<sup>497</sup> *Id.* (Scalia, J., dissenting).

<sup>498</sup> *Id.* (Scalia, J., dissenting).

<sup>499</sup> *Lawrence v. Texas*, 539 U.S. 558, 597 (2002) (Scalia, J., dissenting).

<sup>500</sup> *Id.* (Scalia, J., dissenting).

<sup>501</sup> *Id.* at 598 (Scalia, J., dissenting) (“The Court’s discussion of these foreign views . . . is therefore meaningless dicta.”).

<sup>502</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>503</sup> *Id.* at 599–600 (Scalia, J., dissenting) (noting that “[m]en and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex”).

<sup>504</sup> *Id.* at 600 (Scalia, J., dissenting). It is noteworthy that in this observation Justice Scalia, in focusing on white supremacy, appears to embrace an antisubordination approach.

<sup>505</sup> *Lawrence v. Texas*, 539 U.S. 558, 600–01 (2002) (Scalia, J., dissenting).

<sup>506</sup> *Id.* at 601 (2002) (Scalia, J., dissenting) (rejecting, as unfounded in precedent, Justice O’Connor’s application of “a more searching form of rational basis review”).

<sup>507</sup> *Id.* at 601 (Scalia, J., dissenting).

<sup>508</sup> *Id.* (Scalia, J., dissenting).

<sup>509</sup> *Id.* (Scalia, J., dissenting).



a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”<sup>510</sup>

Not very credibly proclaiming that “I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means,”<sup>511</sup> Justice Scalia gets to the heart of his sentiments: for some in this society homosexuals and homosexuality trigger the “yuk factor.”<sup>512</sup> They think that homosexuals are perverts and homosexuality is an abomination, so they should be free to discriminate against homosexuals in myriad areas of civil society.<sup>513</sup> The dissent would support legal changes only when brought about through democratic means, a proposition that would make popular acceptance of changes in social perceptions of sexuality and morality a pre-condition to the protection of sexual minorities.<sup>514</sup> Under such a paradigm, Texas’s criminalization of same-sex sodomy “is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand [ ] new ‘constitutional right’ by a Court that is impatient of democratic change.”<sup>515</sup> With the process in the hands of the people, the laws could decriminalize sodomy but retain a prohibition of same-sex marriage.<sup>516</sup> The dissent concluded that the Texas statute does not

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<sup>510</sup> *Id.* at 602 (Scalia, J., dissenting).

<sup>511</sup> *Lawrence v. Texas*, 539 U.S. 558, 603 (2002) (Scalia, J., dissenting).

<sup>512</sup> Jami Weinstein & Tobyn DeMarco, *Challenging Dissent: The Ontology and Logic of Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 423, 457–58 (2004) (explaining the “yuk factor” as the idea that homosexual sexual contact is immoral because it is “yuk” and that should be sufficient for rational basis of review).

<sup>513</sup> *Lawrence*, 539 U.S. at 602–03 (Scalia, J., dissenting). Justice Scalia claimed:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination” under Title VII have repeatedly been rejected by Congress; that in some cases such “discrimination” is *mandated* by federal statute; and that in some cases such “discrimination” is a constitutional right.

*Id.* (Scalia, J., dissenting) (citations omitted).

<sup>514</sup> *Id.* at 603–04 (Scalia, J., dissenting).

<sup>515</sup> *Id.* at 603 (Scalia, J., dissenting).

<sup>516</sup> *Id.* at 604 (Scalia, J., dissenting). The dissent is concerned that the opinion obliterates any reason to differentiate same-sex from opposite-sex unions as the only grounds for the current prohibition is moral disapprobation as, for example, procreation cannot be a ground because sterile and infertile people can marry. *Id.* at 604–05.

infringe on a fundamental right, does not deny the equal protection of the laws, and is supported by a rational relation to Texas's legitimate state interests.<sup>517</sup>

## 2. Critical Observations

There are several noteworthy elements to Justice Scalia's dissent. One is his now common, overt, and patent derision and lack of respect for the opinion of his colleagues. It is perhaps this embrace of professional incivility that allows him similarly to embrace discrimination against homosexuals.

To be sure, his insistence that legislation against homosexuals as a "unpopular group" be reviewed under a rational basis of analysis ignores the structural model created by *Carolene Products* as well as the Court's interpretive jurisprudence.<sup>518</sup> In his ideological pursuit of a world in which discrimination against gays and lesbians is allowed because "Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home,"<sup>519</sup> Justice Scalia equated laws proscribing sodomy with laws proscribing prostitution, bestiality, masturbation, and incest, among others.<sup>520</sup> Leaving aside the reality that, Scalia's dissent notwithstanding,<sup>521</sup> no laws against masturbation exist, Justice Scalia ignored two huge differences between sodomy laws on the one hand and those that he addresses on the other. One noteworthy difference is that sodomy laws, as both the majority and O'Connor's concurrence as well as the transnational authorities acknowledge, outlaw conduct that is indivisible from the actors' identities—sodomy offenses create sodomites, criminally marked people.

Another difference is that, in crafting his fear-mongering, slippery-slope argument, Justice Scalia ignored both the spatial and relational aspects of the decision, which address the invalidity of criminalizing adult, consensual, noncommercial, sexual contact in the privacy of one's home. In contrast, prostitution, for example, is a commercial enterprise. Ample literature exists to justify the regulation of prostitution for health and safety reasons.<sup>522</sup> Similarly,

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<sup>517</sup> *Id.* at 605 (Scalia, J., dissenting).

<sup>518</sup> *Id.* at 580; see also *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (gays, lesbians and bisexuals as a targeted group); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435–37 (1985) (the mentally challenged as an unpopular group); *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982) (children of undocumented foreigners who themselves may be undocumented as a subordinated group); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (hippies as an unpopular group).

<sup>519</sup> *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

<sup>520</sup> *Id.* at 590 (Scalia, J., dissenting).

<sup>521</sup> *Id.* (Scalia, J., dissenting).

<sup>522</sup> See Berta E. Hernández-Truyol & Jane E. Larson, *Both Work and Violence: Prostitution and Human Rights*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 183 (Berta

the state's interest in regulation of health and safety, as well as the protection of its citizens, can justify laws against bestiality, incest, and even obscenity.<sup>523</sup> Thus, to suggest that such regulation is justifiable "only in light of *Bowers*' validation of laws based on moral choices"<sup>524</sup> is folly.<sup>525</sup>

Moreover, Justice Scalia's claim that he has "nothing against homosexuals . . . promoting their agenda through normal democratic means"<sup>526</sup> is deeply flawed. As Justice Scalia's own opinion renders patently clear, there still today exists the large scale "moral opprobrium that has traditionally attached to homosexual conduct."<sup>527</sup> Given this admitted social (and religious) derision of an identifiable group, to allow the fate of such a minority to lie in the hands of a popular democratic majority supports the idea of a tyrannical majority—a concept fundamentally rejected in the history and philosophical foundations of this country.<sup>528</sup> Deference to a popular majority's moral opprobrium towards

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E. Hernández-Truyol ed. 2002) [hereinafter *MORAL IMPERIALISM*]; see also *Lochner v. New York*, 198 U.S. 45, 53 (1905) (noting that the State can regulate health concerns).

<sup>523</sup> *Benton v. State* 461 S.E.2d 202, 203–04 (Ga. 1995) (holding that criminalization of incest is a legitimate state interest in the protection of children and the family unit); *Singh v. Singh*, 569 A.2d 1112, 1121 (Conn. 1990) (finding it is the relationship between the parties which justifies the regulation of the ability to marry not simply whether the parties were blood relatives); *In re Marriage of Adams*, 604 P.2d 332 (Mont. 1979) (holding that under state statute marriage between first cousins is prohibited), *rev'd on other grounds*, *Dagel v. City of Great Falls*, 819 P.2d 186 (Mont. 1991); *Audley v. Audley*, 187 N.Y.S. 652, 654 (N.Y. App. Div. 1921) (upholding prohibitions against whole and half blood marriages reasoning that the "prohibition was enacted for the benefit of the public health and the perpetuation of the human race"); see also Brett H. McDonnell, *Is Incest Next?*, 10 *CARDOZO WOMEN'S L.J.* 337 (2004).

<sup>524</sup> *Lawrence*, 538 U.S. at 590 (Scalia, J., dissenting).

<sup>525</sup> For example, while *Roe* can be cited for the proposition that it is within a zone of privacy to elect certain medical procedures, courts generally conclude that the government is justified in barring uses of certain drugs or treatments. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (no liberty interest in right to physician-assisted suicide); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278–80 (1990) (liberty interest in refusing undesired medical treatment); *Whalen v. Roe*, 429 U.S. 589, 597–98 (1977) (supporting state interest in minimizing misuse of dangerous drugs, deterring potential violators, and aiding in detection or investigation of abuse); *Planned Parenthood v. Danforth*, 428 U.S. 52, 80 (1976) (acknowledging certain "[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect patient confidentiality and privacy are permissible"); *Lochner v. New York*, 198 U.S. 45, 73–74 (supporting health and safety bases); *States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1313–14 (5th Cir. 1987), *cert. denied*, 484 U.S. 65, 1065 (1988) (rejecting right to use unlicensed drugs).

<sup>526</sup> *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting).

<sup>527</sup> *Id.* at 602 (Scalia, J., dissenting).

<sup>528</sup> On tyranny of the majority, the English philosopher John Stuart Mill, in his renowned essay *On Liberty*, wrote:

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons

homosexuality naturalizes, mythologizes, and generalizes as tradition a very myopic and inaccurate conceptualization of the world. First, contrary to Justice Scalia's claim that homosexuality has been deemed an abomination since time immemorial,<sup>529</sup> as the majority noted, the targeting of homosexuals by legislation is of relatively recent making.<sup>530</sup> Indeed, the constructions of homosexuality and

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perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

JOHN STUART MILL, ON LIBERTY 8–9 (Stefan Collini ed., 1989) (1859). President James Madison wrote:

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be grad[u]ally induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

THE FEDERALIST NO. 51 (James Madison). And in his section on tyranny of the majority, de Tocqueville provided:

When I refuse to obey an unjust law, I do not contest the right of the majority to command, but I simply appeal from the sovereignty of the people to the sovereignty of mankind. Some have not feared to assert that a people can never outstep the boundaries of justice and reason in those affairs which are peculiarly its own; and that consequently full power may be given to the majority by which they are represented. But this is the language of a slave.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 330 (Henry Reeve trans., University Press 2d ed. 1863) (1862).

<sup>529</sup> *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

<sup>530</sup> *Id.* at 570.

the homosexual identity are of recent origin.<sup>531</sup> In addition, such a myopic conception of social disapproval of people who express sexuality in a way other than heteronormative is culturally imperialistic as it ignores the embrace of different sexualities throughout history, including the United States' own first peoples—who held two-spirit persons in high regard,<sup>532</sup> and early religious approval of same-sex unions.<sup>533</sup>

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<sup>531</sup> TAMSIN SPARGO, *FOUCAULT AND QUEER THEORY* 17–20 (1999) (noting the category of homosexuality is “of comparatively recent origin” dating to the late 19th century); see also William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004). Eskridge explains:

[T]he concept of “homosexual” anything did not emerge in western civilization until the end of the nineteenth century. Almost all of the reported sodomy prosecutions from the nineteenth century involved nonconsensual or public conduct by men preying on weaker children, women, or other men. In short, the focus of crime against nature laws was neither homosexual nor consensual activities as far as one can discern from the historical record. Thus, [in *Bowers*.] Justice White’s “strong” claim that American laws criminalizing consensual “homosexual sodomy” have “ancient roots” was, “at best, facetious” as a matter of serious historiography.

*Id.* at 1046–47 (footnotes omitted). He emphatically states:

Eminent constitutional thinkers have taken the position that the Framers of the Constitution and the Reconstruction Amendments did not “mean” to bind future generations to the specific expectations they had when their work was ratified by “We the People.” The Framers understood and accepted that future generations would find their constitutional purposes best fulfilled in unpredictable and unforeseen settings. . . . Once social, economic, or normative conditions have changed in ways that affect an issue, not only is originalism less attractive, it is also unworkable. . . . In 1868, there was no concept of homosexuality, and it was possible to believe that only a few demonic individuals were sodomites. *In 2003, we are all sodomites, and homosexuality is now understood as a sexual orientation and not a terrible moral or medical disease.* These new social facts have got to affect the issue posed in [*Bowers*] and *Lawrence*. . . . If the Framers knew that America would become a nation of well-functioning sodomites and openly gay citizens, would they have wanted the government to remain free to pry into these people’s bedrooms? Would the Framers believe that sodomy laws comport with “due process of law” if the experts were all agreed that such laws had no effect on the level of sodomy in a jurisdiction . . . Surely not.

*Id.* at 1048–49 (footnotes omitted) (emphasis added).

<sup>532</sup> See, e.g., Sabine Lang, *Various Kinds of Two-Spirit People: Gender Variance and Homosexuality in Native American Communities*, in *TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY* (Sue-Ellen Jacobs et al. eds., 1997).

<sup>533</sup> For a detailed historical religious approbation of same-sex unions, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). Eskridge notes:

The early Egyptian and Mesopotamian societies that are considered important antecedents for Western culture apparently not only tolerated same-sex relationships, but also recognized such relationships in their culture, literature, and mythology. Evidence of same-sex marriage is at best indirect in these ancient societies, however. One finds slightly stronger and more direct evidence of same-sex marriages in Greek and early Roman

Finally, a central legal defect in Justice Scalia's dissent is that he conveniently but erroneously framed constitutional questions as if the U.S. Constitution were a positive constitution effecting a grant of specific substantive rights. To the contrary, the U.S. Constitution is a negative one delineating a litany of locations in which persons' lives are free from governmental intrusion. To be sure, in this light, the articulation in *Bowers* of the issue as the existence of a fundamental right to homosexual sodomy was and remains patently absurd. No person has a positive constitutional right to engage in any type of sexual conduct. Due process and equal protection guarantees simply ensure persons' rights to be free from governmental interference in certain spheres of life, including consensual, adult, private, noncommercial sexual activity, and to be treated "equally" under the law. In this regard, the articulation of the issue in *Lawrence* (and by the dissent in *Bowers*) are the constitutionally honest ones. In sum, Justice Scalia's rant is jurisprudentially ill-advised, as well as legally, historically, and culturally inaccurate.

#### IV. QUERYING *LAWRENCE*—A SEARCH FOR COHERENCE

The *Lawrence* decision, in invalidating Texas's sodomy laws, aligns U.S. jurisprudence with the international, European, and foreign decisions discussed with respect to private, consensual, same-sex, adult conduct. After *Lawrence* in the United States, as in the international realm, certain rights of adults to act in private are excised from the sphere of the government's legitimate business. Yet the question remains with respect to how *Lawrence* will be used to further full equality norms for gays and lesbians. Two post-*Lawrence* cases do not give reason to celebrate *Lawrence* as a panacea for full citizenship for gays and lesbians in the United States.

Thus, having reviewed the stated facts in the case as well as presented and critiqued the majority and concurring opinions and the dissent, it is now

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culture, in imperial Rome, and in Western Europe for much of the Christian Middle Ages.

*Id.* at 1437. This was followed by:

[There was a] general acceptance of same-sex unions by the early [Roman Catholic] Church. . . . Gay clerics apparently took part in homosexual marriage ceremonies, which were widely known in the Catholic world from the fifth century on. Such ceremonies were performed in Catholic churches by priests and either established what the community regarded as marriages, or commemorated special friendships, in both cases in devoutly Christian terms.

*Id.* at 1452 (citing John Boswell, *Homosexuality and Religious Life: A Historical Approach*, in *Homosexuality in the Priesthood and the Religious Life* 3, 11 (Jeannine Gramick ed., 1989)). Eskridge also notes "[t]here is very strong evidence demonstrating the existence of same-sex unions, including legally recognized marriages, in Native American, African, and Asian cultures, evidence which is especially striking prior to those cultures' domination by Western Europe." *Id.* at 1453.

appropriate to interrogate the meaning of this celebrated case in a larger context. In order to engage in such a critique, this section in Part IV.A, *Critical Theoretical Frameworks*, first presents relevant critical theoretical frameworks. Next, in Part IV.B, *Critical Interrogations*, the work engages in three critical interrogations of the decision. First, it develops certain facts of the case that are not part of its very terse legal narrative and, in light of the newly revealed facts, explores the pregnant silences in the opinion. In the second and third critical interrogations, focusing on privacy and equality, respectively, this section examines the meaning, failings, and future of *Lawrence*. Finally, in Part IV.C, *Empire*, the work engages in a cultural analysis of domination.

### A. Critical Theoretical Frameworks

Critical theory is a relatively recent genre of critical jurisprudence. While at the outset it was a general critique of the law from a progressive perspective,<sup>534</sup> the initial critical movements failed to include or center the nonnormative subject in the critique of law. Therefore, “outsider” communities worked to develop various strands of critical analysis centering on various and varied essentialized subjects.<sup>535</sup> These critiques gave rise to various exciting legal movements that challenged the normative heteropatriarchal foundations of law. Critical theory exposes the structural biases of normativity in law, which I call a “destructive in/justice paradox.”<sup>536</sup> As socially constructed beliefs and expectations become written into law, they create and perpetuate biases based on constructed social inequalities between people which, in turn, are normalized by the law. Critical theory unearths those masked biases.

For example, feminist legal theory emerged from a historically and legally sanctioned “separate spheres” ideology<sup>537</sup> that located men in the public sphere of

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<sup>534</sup> See, e.g., ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); RADICAL CRITIQUES OF THE LAW (Stephen M. Griffin & Robert C.L. Moffat eds., 1997).

<sup>535</sup> On essentialism, see Catherine A. MacKinnon, *Keeping It Real: On Anti-Essentialism*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71 (Francisco Valdes et al. eds., 2002) [hereinafter CROSSROADS]; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2000).

<sup>536</sup> See Berta E. Hernández-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal*, 17 WIS. WOMAN’S L.J. 111, 116 (2002) (noting a parallel to what in psychology is called a “destructive therapeutic paradox” because persons who do not conform to the perceived norm for their gender may be viewed as pathological, having stereotypical beliefs regarding gender both reinforce and create limitations in peoples’ functioning).

<sup>537</sup> See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 59 (1989) (Throughout history different visions of men and women have evolved; from Aristotle to Aquinas, they have

work and government and women in the private sphere of home and domestic life. However, as the legal system has focused regulation on the public sphere and has, traditionally, left the private sphere to individual control, much of women's lives have been lived outside the scope of the protection of the legal rules that envelop men's existence. Liberal jurisprudence, focusing on the individual and on negative rights—rights to be free from government intrusion—obscured the reality of gender stratification and subordination.<sup>538</sup>

Feminist theory asks the “woman” (women) question to unveil sex-based biases in law that have the appearance of neutrality. Feminist theory is not static; it has experienced three stages.<sup>539</sup> The “sameness” or equality stage was based on classic liberal philosophy and operated to show that when women were just like men they should be treated equally. The “difference” stage emphasized the structural nature of gendered ordering and interrogated how sex has influenced the development of social and societal structures and norms and explored what impact the gendered nature of those developments has had on women throughout history. This inquiry confirmed that gender bias is not an accident in the law and its structures, but a central force in its development.<sup>540</sup> The antiessentialism stage

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been deemed to exist in “separate spheres.”); *see also* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (noting that “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman”).

<sup>538</sup> *See* DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* 122 (1999).

<sup>539</sup> *See* Hernández, *supra* note 536, at 116–17, 121–30. Feminist legal theory has experienced three waves or stages. *Id.* The first stage, the “sameness” or “equality stage,” grounded on classical liberal philosophy, focused on the “autonomy of the individual and insists that women, like men, are entitled to the freedoms at the core of liberal theory.” *Id.* at 121–22 (citation omitted). This feminism did not “challenge existing social, economic, and political rules and structures of democratic societies,” but rather “argue[d] that women, just like men, ought to have access to the protection of the rules and membership in the structures.” *Id.* at 122 (citations omitted). The second wave, the “difference” stage, focused on the differences between men and women and “emphasize[d] that gendered oppression is structural, and that structural gendered ordering is socially constructed and not naturally or biologically preordained.” *Id.* at 123–24 (citation omitted). This approach revealed existing biases in norms and institutions that served to “perpetuate the status quo and entrench existing inequalities.” *Id.* at 124 (citation omitted). It also recognized that in some respects, paradigmatically reproduction, men and women are not similarly situated. *Id.* at 125. The third wave of feminism is the antiessentialism stage, which challenges the idea that there is a universal experience attributable to and shared by all women regardless of race, class, sexual orientation, ethnicity, or other aspects of their individual circumstances. *Id.* at 126–30. It “rejects general and universal categorizations of women as falsely and inappropriately homogenizing.” *Id.* at 127.

<sup>540</sup> MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY 2* (1999) (“[G]ender bias constitutes a pervasive feature of our law, rather than merely representing isolated instances of abuse of law. . . . [D]issect[ing] legal doctrines and the language of court opinions and statutes [helps] to find hidden mechanisms of discrimination and uncover the implicit hierarchies that are contained within a body of law.”).



has focused on the diversity of women and has rejected the universalization of a unitary “woman” category. Significant for this essay is the reality that nonessentialist feminisms include various feminisms and thus recognize and acknowledge the huge diversities among women.<sup>541</sup> In sum, feminism has exposed that the law has been created by and constructed from a masculine viewpoint. This perspective gives law a male-normativity—with the result that the maleness of the law obscures women, effects their loss of agency, and devalues their personhood.

Similarly, critical race theory, which emerged in the legal academy in the United States during the late 1980s, focused the discourse on race. Like critical legal studies and feminist theory, critical race theory rejects the presumed neutrality and universality of liberal philosophy. For example, critical race theory challenges the myth that color-blindness, based as it is on the idea of looking at the individual and not a group, can work to eliminate racism; that racism is an individual, not a structural, problem and that racism is isolated and can be eradicated in a vacuum rather than as part of the interlocking systems of oppression and subordination that exist in society.<sup>542</sup>

While critical race theory centered on race and feminist legal theory centered on sex/gender, both shared a critique of the presumed normativity of social and legal structures that claimed neutrality while effecting subordination. Like third wave feminism, critical race theory also challenged the monocular analytical framework that did not allow, for example, black women to challenge norms from their location as both black and female.<sup>543</sup> Thus emerged the body of work of critical race feminism which, like nonessentialist feminism, challenged

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<sup>541</sup> Feminisms included in nonessentialist feminism incorporate third-world development feminism (focusing on the impact on women of economic development in post-colonial societies), women of color feminism (emphasizing the multidimensional nature of discrimination and focusing on the “interlocking [multisystems] of domination that render the categories of ‘man’ and ‘woman’ insufficient to evaluate the condition of women of color”), and postmodern feminism (contesting the existence of any objective reality and rejecting that there can be a single truth). Hernández, *supra* note 536, at 127–29 (citations omitted).

<sup>542</sup> Francisco Valdes et al., *Introduction: Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, *supra* note 535, at 1–2.

<sup>543</sup> See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103 (Kimberlé Crenshaw et al. eds., 1995); *DeGraffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480–81 (8th Cir. 1977). In an action “brought by five black women against former employer alleging that seniority system and ‘last hired–first fired’ layoff policy mandated by collective bargaining agreement perpetuated effect of employer’s past race and sex discrimination,” the Court of Appeals affirmed lower court’s ruling that “claims of race and sex discrimination under the Civil Rights Act of 1964 were either barred by limitations or failed to state violation of the Act” and reversed lower court’s “dismissal of race discrimination claims based on federal civil rights statute on grounds of judicial economy.” *Id.* (*aff’d & rev’d in part*, 413 F. Supp. 142 (Mo. 1976)).

normative assumptions of single-trait analysis in law as unrealistic and, at both the domestic and global spheres, urged a recognition of the complexity of the lives of women of color.<sup>544</sup>

This trend of interrogating the neutrality and objectivity in the normative legal discourse was continued by Asian American scholars as well as by LatCrit theorists.<sup>545</sup> In particular, LatCrit theorists utilize Latina/o multidimensionality, including their panethnicity,<sup>546</sup> in order to locate Latinas and Latinos in larger inter-group frameworks, both domestically and globally, to promote nonessentialist justice. LatCrit theory originated in Latina/o socio-legal invisibility within the U.S. borderlands. Utilizing the lessons of the prior critical race and feminist movements, it embraced their antisubordination ideas, welcomed its communities, and expanded the reception of outsider groups to its core constituency. In this regard, LatCrit scholars have embraced and incorporated not only critical race and feminist theoretical models and ideas, but also the ideas and methodologies of queer legal theory,<sup>547</sup> an analytical

<sup>544</sup> See GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien K. Wing ed. 2000); CRITICAL RACE FEMINISM: A READER (Adrien K. Wing ed. 2003).

<sup>545</sup> LatCrit theory is a relatively recent genre of critical outsider jurisprudence that has dual goals of (1) developing a critical and interdisciplinary discourse on law and policy towards Latina/os and (2) fostering the development of coalitional theory in practice and making this knowledge available to agents of social and legal change. In this goal of knowledge production, LatCrit has generated a wide body of literature. See, e.g., Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship (LatCrit I)*, 2 HARV. LATINO L. REV. 1 (1997); Joint Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory (LatCrit II)*, 19 CHICANO-LATINO L. REV. 1 (1998); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory (LatCrit III)*, 53 U. MIAMI L. REV. 575 (1999); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections (LatCrit IV)*, 3 U.C. DAVIS L. REV. 751 (2000); Joint Symposium, *Culture, Language, Sexuality and Law: LatCrit Theory and the Construction of the Nation*, 5 MICH. J. RACE & L. 787 (2000), 33 U. MICH. J.L. REFORM 203 (2000); Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality (LatCrit V)*, 78 DEN. U. L. REV. 467 (2001); Symposium, *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory (LatCrit VI)*, 55 U. FLA. L. REV. 1 (2003), 54 RUTGERS L. REV. 803 (2002); Symposium, *LatCrit VII: Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community*, 13 LA RAZA L.J. 113 (2002), 81 U. OREGON L. REV. 595 (2002) (2 vols.); Symposium, *City and the Citizen: Operations of Power, Strategies of Resistance (LatCrit VIII)*, 52 CLEV. ST. L. REV. (forthcoming 2005).

<sup>546</sup> See Berta E. Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994).

<sup>547</sup> See ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION (1996). Queer theory is marked by

definitional indeterminacy, its elasticity, [as] one of its constituent characteristics. . . . [It] is unaligned with any specific identity category, [and therefore] it has the potential to be annexed profitably to any number of discussions. . . . Broadly speaking, queer describes

framework that “describes a subject position that seeks to dismantle straight supremacy in law and society, and to oppose its mutually reinforcing interactions with other forms of oppression, including white supremacy and male supremacy.”<sup>548</sup>

Interestingly, LatCrit theory and queer legal theory emerged at about the same time.<sup>549</sup> However, although the articulated “queer” location at the outset of the movement expressly embraced the rejection of all oppressions—including not only homophobia but also racism, sexism, and other bigotries—a self-critical analysis of queer legal scholarship shows that “sexual orientation legal scholarship has elided race, ethnicity, class, and gender.”<sup>550</sup> Interestingly, lesbian legal theorists have emphasized the multidimensional nature of sexual minorities, expressly incorporating gender, class, and race analysis into the literature.<sup>551</sup>

LatCrit theory, however, having developed contemporaneously with queer theory, and largely because of its self-conscious and self-critical commitment to multidimensionality inspired by the racial, ethnic, class, religious, and sexual diversity of Latinas and Latinos, has successfully incorporated critical race theory, feminist, queer, and anticolonialism ideals into its literature.<sup>552</sup> What is significant, and what all these strands of critical legal theory have in common, and

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those gestures or analytical models which dramatise incoherencies in the allegedly stable relations between chromosomal sex, gender and sexual desire. Resisting that model of stability—which claims heterosexuality as its origin, when it is more properly its effect—queer focuses on mismatches between sex, gender and desire. . . . [In some] queer locates and exploits the incoherencies in those three terms which stabilise heterosexuality.

*Id.* at 1–3.

<sup>548</sup> Francisco Valdes, *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits, and LatCrits*, 53 U. MIAMI L. REV. 1265, 1293 n.79 (1999) [hereinafter Valdes, *Theorizing “OutCrit”*]; see also Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). Significantly, the queer position does not limit itself to those who are identified as sexual minority members. *Id.* at 354–56 (explaining relationship between minority and majority sexual identities to queer denomination).

<sup>549</sup> See Valdes, *Theorizing “OutCrit,”* *supra* note 548, at 1294.

<sup>550</sup> *Id.* at 1295. “Although the ‘Queer’ reclamation stands for expansive and egalitarian antisubordination consciousness, it sometimes has been operationalized as a white and male force, which has caused some hesitation about the capacity of a ‘Queer’ movement to practice ‘Queer’ ideals.” *Id.* at 1295 n.82. For a recent critique of queer theory, see Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 7–8 (2004) (noting that “queer theory has embraced a sexual politics that sometimes seemingly above all eschews sexual regulation, particularly when it issues from the state, and pursues instead the proliferation of bodily—including ‘sexual’—pleasures”) (footnotes omitted).

<sup>551</sup> See Valdes, *Theorizing “OutCrit,”* *supra* note 548, at 1295 n.83 (citing specific literature). For the intersection of feminism and queer theory, see FEMINISM MEETS QUEER THEORY (Elizabeth Weed & Naomi Schor eds., 1997).

<sup>552</sup> See *infra* Part IV.C for discussion of empire.

which LatCrit has sought to incorporate, is that they are “interdisciplinary modes of inquiry; [all] constitu[ting] themselves in critical relation to a set of hegemonic social[, legal] and cultural formations.”<sup>553</sup> These various theoretical models provide the foundation for critical interrogations of *Lawrence*.

## B. Critical Interrogations

### 1. *Realities: A Fuller Account of the Facts*

The *Lawrence* facts are so minimal and the case so significant that any reader is left with the sense that there has to be more to the events of that auspicious day than the Court tells. For example, who exactly are John Geddes Lawrence and Tyrone Garner? What, if any, is their “relationship” to one another—a relationship that is so central to the Court’s finding that it is protected under the constitutional liberty interest? It is evident that counsel took great efforts to keep the private lives of these men very, very quiet. But why? Surely not because it is a case about privacy. My interest was piqued, so I sought to unearth information that might assist with a critical analysis of the decision. What follows is the little I could discover beyond the Court’s statement.

The first plaintiff listed in the case is John Geddes Lawrence, a fifty-nine-year-old white man who is a medical technician and, when the case was decided, was working at Bayshore Medical Center at Pasadena where he occasionally served as a shift supervisor in a hospital lab.<sup>554</sup> The arrest in Texas was not Lawrence’s first encounter with the law. In 1967, he was convicted of murder by automobile and was sentenced to five years probation.<sup>555</sup> He also had some DWI convictions.<sup>556</sup> And it seems that his financial situation was not fully stable—as of the time of the Supreme Court’s decision he had filed for bankruptcy.<sup>557</sup> Also, at that time, he was still living in the same apartment at the Colorado Club Apartments where he and Tyrone Gardner were arrested in 1998.<sup>558</sup> In mid-2003, a neighbor in the apartment complex and a co-worker described him as a quiet man who kept mostly to himself.<sup>559</sup>

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<sup>553</sup> Elizabeth Weed, *Introduction to FEMINISM MEETS QUEER THEORY*, *supra* note 551, at vii.

<sup>554</sup> Bruce Nichols, “*We Never Chose to Be Public Figures*”: *Houston Men Were Surrounded by Secrecy Throughout Appeal*, DALLAS MORNING NEWS, June 27, 2003, at 19A.

<sup>555</sup> *Id.*

<sup>556</sup> *Id.*

<sup>557</sup> *Id.*

<sup>558</sup> *Id.*

<sup>559</sup> *Id.*

The other plaintiff, Tyrone Garner, is a 35-year-old black man.<sup>560</sup> He was only 31 at the time of the arrest, making him 20 years Lawrence's junior. Although I was unable to locate any information about his current residence or employment, he was unemployed at the time of the arrest.<sup>561</sup> Like Lawrence, Garner is no stranger to the law. In fact, he had encounters with the law both before and since September 1999. Harris County records show that he had arrests for drunk driving and possession of marijuana, as well as two convictions for assault, one in 1995 and one in 2000.<sup>562</sup> In November of 1998, just two months after the arrest that was the basis for the Supreme Court decision, Garner was arrested for assault on Robert Royce Eubanks,<sup>563</sup> the same Eubanks who provided the tip to the police about Lawrence and Garner's criminal sexual conduct that resulted in the arrest that triggered *Lawrence*.<sup>564</sup> It appears that in November, Garner and Eubanks had been out drinking in Houston, returned to a hotel room, got into an argument and, according to Eubanks's account, Garner swatted him with a belt.<sup>565</sup> However, the charges were dropped the next day.<sup>566</sup>

Eubanks's relationship to the petitioners is not fully clear. Some published sources refer to him as Garner's roommate but do not establish whether Eubanks was Garner's roommate at the time of the call to the police or whether he had previously been Garner's roommate.<sup>567</sup> Some accounts reveal that in 2000 Eubanks went to court to obtain an order of protection against Garner, alleging that Garner physically and sexually assaulted him.<sup>568</sup> There are various accounts of other altercations between Eubanks and Garner, including a 2000 incident in

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<sup>560</sup> Nichols, *supra* note 554.

<sup>561</sup> Dana Calvo, *Private Lives Amid a Very Public Decision*, L.A. TIMES, July 1, 2003, at E1.

<sup>562</sup> Nichols, *supra* note 554.

<sup>563</sup> Lisa Teachey, *Challenger of Sodomy Law Accused of Assaulting Man*, HOUS. CHRON., Nov. 24, 1998, at A22 [hereinafter Teachey, *Challenger of Sodomy Law*]; Lisa Teachey, *Defendant in Sodomy Case Out of Jail After Assault Charges Dismissed*, HOUS. CHRON., Nov. 25, 1998, at A23 [hereinafter Teachey, *Defendant in Sodomy Case*].

<sup>564</sup> Terri Langford, *Houston-Area Case Seen as Challenge to Sodomy Law*, SAN ANTONIO EXPRESS-NEWS, Nov. 7, 1998, at 22A; Nichols, *supra* note 554.

<sup>565</sup> *Assault Charges Dropped Against Challenger to State Sodomy Law*, DALLAS MORNING NEWS, Nov. 25, 1998, at A19 [hereinafter *Charges Dropped*]; Teachey, *Challenger of Sodomy Law*, *supra* note 548; Teachey, *Defendant in Sodomy Case*, *supra* note 548.

<sup>566</sup> Claudia Kolker, *Legal Assaults Against States' Anti-Sodomy Laws Multiply*, L.A. TIMES, Dec. 3, 1998, at A5; Teachey, *Challenger of Sodomy Law*, *supra* note 563; Teachey, *Defendant in Sodomy Case*, *supra* note 563; *Charges Dropped*, *supra* note 565.

<sup>567</sup> *Appeals Court Rejects State's Sodomy Law*, AUSTIN AM.-STATESMAN, June 9, 2000; Kristen Hays, *Sodomy Law Is Upheld: Court Overturns Panel's '00 Ruling*, SAN ANTONIO EXPRESS-NEWS, Mar. 16, 2001, at 1A; Nichols, *supra* note 554; *Texas Court Tosses Gay Sodomy Law*, WASH. POST, June 9, 2000, at A25.

<sup>568</sup> Nichols, *supra* note 554.

which Garner punched Eubanks in the eye twice;<sup>569</sup> a 1999 event, when while drinking and high on crack, Garner beat Eubanks with a hose;<sup>570</sup> and a 1998 episode where Garner allegedly stabbed Eubanks in the finger with a box cutter, burned him with a hot iron, and sexually assaulted him.<sup>571</sup>

One interesting puzzle is the source and substance of the report that prompted the police to go to the residence on that particular night. One of the very first, if not the first, news accounts of the incident indicates that the source was Robert Royce Eubanks, also known as Roger David Nance.<sup>572</sup> However, subsequent accounts refer to the source of information in a variety of ways. While some accounts do specifically name either Eubanks or Nance, his description varies: from an acquaintance,<sup>573</sup> to an ex-friend,<sup>574</sup> to a neighbor,<sup>575</sup> to specifically a neighbor with a grudge.<sup>576</sup> Other news accounts identify the source as a romantic rival<sup>577</sup> or Garner's roommate.<sup>578</sup>

Specifically regarding the call itself, details of the information given to the police are lacking and the available accounts vary widely. Some characterize the call as stemming from a personality dispute or conflict,<sup>579</sup> a personal "spat,"<sup>580</sup> or a "grudge";<sup>581</sup> while others referred to it as a domestic disturbance<sup>582</sup> or as a

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<sup>569</sup> *Id.*

<sup>570</sup> *Id.*

<sup>571</sup> *Id.*

<sup>572</sup> Langford, *supra* note 564.

<sup>573</sup> Patty Reinert, *Supreme Court Takes Houston Sodomy Case*, HOUS. CHRON., Dec. 3, 2002, at A1.

<sup>574</sup> Kolker, *supra* note 566.

<sup>575</sup> *Gay Agenda? Acceptance as Americans*, CHARLESTON GAZETTE (W. Va.), July 2, 2003, at 4A; Anne Gearan, *Supreme Court Hears New Test of Bans on Homosexual Sex*, Mar. 26, 2003, available at <http://www.sodomylaws.org/lawrence/lwnews044.htm> (last modified July 20, 2003).

<sup>576</sup> Editorial, *Court Gets It Right On Rights and Private Acts*, J. & COURIER (Lafayette, In.), June 28, 2003, at 5A; Nancy Gibbs, *A Yea for Gays: The Supreme Court Scraps Sodomy Laws, Setting Off a Hot Debate*, TIME MAG., July 7, 2003, at 38.

<sup>577</sup> Nichols, *supra* note 554.

<sup>578</sup> *Appeals Court Rejects State's Sodomy Law*, *supra* note 567; Hays, *supra* note 567; Nichols, *supra* note 554; *Texas Court Tosses Gay Sodomy Law*, *supra* note 567.

<sup>579</sup> Paul Duggan, *Texas Sodomy Arrest Opens Legal Battle for Gay Activists*, WASH. POST, Nov. 29, 1998, at A03; Langford, *supra* note 564.

<sup>580</sup> Kolker, *supra* note 566.

<sup>581</sup> Editorial, *A Matter of Human Rights*, DENV. POST, June 27, 2003, at 6B; Steve Marantz, *Umass Board: In Bulger We Trust; Gay Sex Ban KO'd, Ruling Aids Same-Sex Marriage Bills*, BOSTON HERALD, June 27, 2003, at 3; *Sodomy Case Going to State Appeals Court: Houston Judge Rejects Efforts to Quash Charges Against 2 Men Arrested At Home*, DALLAS MORNING NEWS, Dec. 23, 1998, at 36A [hereinafter *Case to State Appeals Court*].

<sup>582</sup> Editorial, *To Right a Wrong*, ST. PETERSBURG TIMES (Fl.), Dec. 16, 2002, at 10A.

report of a burglary.<sup>583</sup> Other accounts characterize the call as a report of an armed man<sup>584</sup> or intruder,<sup>585</sup> a man with a gun behaving erratically,<sup>586</sup> a “crazed” man with a gun,<sup>587</sup> or an armed man “going crazy.”<sup>588</sup> Interestingly, a few accounts report that the caller specifically described the intruder as being a black man “going crazy.”<sup>589</sup> However, with regard to the veracity of the report to the police all sources are consistent—regardless of who made the report, or precisely what was said, it was false.<sup>590</sup> In fact, Eubanks was eventually found guilty of filing a false report and served time in jail.<sup>591</sup> In this context, it is interesting that apparently Garner and Eubanks have a history of filing false reports against each other.<sup>592</sup>

These sketchy facts, however, shed light on why advocates and activists may not only be satisfied with the limited statement of facts in *Lawrence*, but even may have been desirous of cloaking Lawrence and Gardner in a veil of secrecy. As one activist observed, “They are not the kind of people that the lawyers want to comment on this case . . . . They were never a couple . . . . They are not articulate.”<sup>593</sup>

To be sure, perhaps nothing but the basic facts offered by the Court are

<sup>583</sup> *Appeals Court Rejects State’s Sodomy Law*, *supra* note 567; Wyatt Buchanan, *Top Court to Address Sodomy: Case of Gay Texans, Fined for Having Sex, Could Affect Laws in 13 States*, S.F. CHRON., Dec. 3, 2002, at A3.

<sup>584</sup> *Case to State Appeals Court*, *supra* note 581.

<sup>585</sup> Steve Brewer, *Conduct Law Unfair to Gays, Attorney Says*, HOUS. CHRON., Nov. 4, 1999, at A29; R.A. Dyer, *Two Men Charged Under State’s Sodomy Law*, HOUS. CHRON., Nov. 6, 1998, at A1; Langford, *supra* note 564; Teachey, *Challenger of Sodomy Law*, *supra* note 563.

<sup>586</sup> Duggan, *supra* note 579.

<sup>587</sup> Editorial, *The Bedroom Police*, COURIER-J. (Louisville, Ky.), Mar. 30, 2003, at 2D.

<sup>588</sup> Joan Biskupic, *Justices to Revisit Sodomy Laws*, USA TODAY, Mar. 25, 2003, at A15; *Case to State Appeals Court*, *supra* note 581; Andrew Gumbel, *Activists Back Challenge to Texas Anti-Gay Laws*, THE INDEPENDENT, Nov. 17, 1998, available at <http://www.sodomylaws.org/usa/texas/txnews11.htm> (last edited July 17, 2002).

<sup>589</sup> Gearan, *supra* note 575; *High Court Hears Texas Sodomy Case, Court Appeared Deeply Divided Wednesday*, CNN.COM, Mar. 26, 2003, at <http://www.cnn.com/2003/LAW/03/26/scotus.sodomy.ap/> (last visited Nov. 10, 2004) [hereinafter *Court Deeply Divided*]; Martin Koppel, *Supreme Court Ruling Advances Gay Rights*, THE MILITANT, Aug. 4, 2003, at 3.

<sup>590</sup> *Case to State Appeals Court*, *supra* note 581; *Court Deeply Divided*, *supra* note 589; Duggan, *supra* note 579; Langford, *supra* note 564; Nichols, *supra* note 554.

<sup>591</sup> *Case to State Appeals Court*, *supra* note 581, Duggan, *supra* note 579; Langford, *supra* note 564.

<sup>592</sup> *Charges Dropped*, *supra* note 565; Teachey, *Defendant in Sodomy Case*, *supra* note 563.

<sup>593</sup> Nichols, *supra* note 554 (quoting “Ray Hill, a pioneering gay rights activist in Houston, who knows both men”).

necessary for deciding this case. Two adults, Lawrence and Gardner, were in an apartment in September of 1998 when the police, responding to a call, entered the apartment, and encountered the two men engaging in sexual activity. Because this was a crime in Texas, the men were arrested and taken to jail. They challenged the constitutionality of the statute. End of story.

But perhaps it should not be the end of the story if one wants to engage in a critical interrogation of the jurisprudence and the case's effects thereon. For example, in *Lawrence*, the decision focuses hugely on the relational aspect of the private conduct. Does this mean that gays' and lesbians' sexual liberty is dependent or conditional upon the existence of a "relationship"? Can *Lawrence* be cited for such a proposition? On the other end of the spectrum, how can we celebrate *Lawrence* as a panacea for the legitimization of gay and lesbian relationships and families if there is no factual basis for the existence of a relationship? And, while there admittedly exists a certain sphere of privacy within families, much of the celebrations of families and families' lives tend to be very public affairs in parks, schools, and workplaces. Does the *Lawrence* decision mean that only the private, or hidden, expressions will be constitutionally protected? The reality is that the facts behind the case are at best incomplete, at worst an uncomfortable representation of only a sliver of the reality that resulted in this decision.

While there is not, nor should there be, any need to have an established relationship of any sort in order to enjoy the constitutional protection of privacy, particularly for intimate conduct, it is also beyond dispute that some conduct—such as domestic violence—carried out within four walls does not, and should not, enjoy shelter from scrutiny. How then can we achieve some principled discussion on the reach of privacy without an engagement of the facts?

What is of concern about the decision is not its outcome but the voids in the narrative. Both men had criminal records, yet there is no questioning of whether they were involved in some criminal activity other than sodomy. Television newsclips on the case and pictures in newspapers show that Lawrence and Garner are an interracial pair, yet none of the accounts of the case allude to race in any way. Indeed, but for the reports that describe the intruder—and by corollary the law breaker—as black, thereby feeding into social stereotypes and fears of blacks as criminals, there has been no mention, let alone interrogation, of the relevancy of race to this case.

Similarly, there is a void with respect to the relevancy of class/socioeconomic status, although the facts suggest disparities may exist. Nor is there any mention of age, notwithstanding the reality that there is a substantial age difference between the petitioners. The fact that Lawrence was white, older, and apparently had more economic resources than Garner is relevant in interrogating the nature of their encounter and bears on whether they had a consensual relationship. Their potential power disparity—based on race, class, age, and perhaps gender expression—provides grounds to inquire about the existence of consent—an



element the majority assumes (but would be irrelevant to the dissent). Without such interrogations, how can we definitively state, as the Court did, that this encounter indeed was a noncommercial, consensual, intimate meeting of two adults?

It is also significant that women are effectively erased from this decision,<sup>594</sup> not unlike in *Bowers*. This exclusion of course may be due to the historical construction of women as nonsexual beings. However, if the exclusion is grounded on the assumption that only men have been historically persecuted for same-sex conduct, it would be a wholly erroneous assumption. Indeed, legal scholarship has exposed the falsity of that claim.<sup>595</sup>

As the expanded *Lawrence* facts above show, certain class, race, age, and possibly gender interrogations were not addressed. The critical theoretical frameworks presented insist that such interrogations are not irrelevant, but rather should be central to the complex analysis in which the Court engaged. These erasures—of race, class, age, and sex—from the existing narrative beg for critical interrogation of the rule of law purportedly laid out by this landmark decision. Similarly, critical interrogation of the legal aspects of the decision—liberty, privacy, and equality—are warranted as they provide a location from which to explore the normative heteropatriarchal foundation of law. At its foundation, the rule of law<sup>596</sup> provides predictability and guidance; in conduct, it enhances individual autonomy. The rule of law must be transparent and obeyable.

Notwithstanding the case's factual deficiencies, the case's facts do suffice to acknowledge that gays and lesbians are people too. In so doing, the case grants this class, with respect to whom there remains an over-abundance of moral opprobrium, full citizenship in the sense of being entitled to the respect and dignity we all are permitted simply because of our humanity. This is a welcomed pronouncement. As both the Kennedy majority and O'Connor's concurrence hold, in line with the transnational authority, when restrictions concern an intimate aspect of an individual's life, government has to demonstrate particularly serious justifications for such an interference. In the United States, after *Lawrence*, the reality that many members of civil society—including families, workplaces, educational spaces, and religious institutions—consider homosexual conduct as immoral or sinful, and may be shocked, offended, or disturbed by it, simply cannot be legal justification for prohibition of such conduct. Contrary to Scalia's vision, such justification for discrimination against an unpopular group

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<sup>594</sup> See Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 397 (2004).

<sup>595</sup> See RUTHANN ROBSON, *LESBIAN OUTLAW: SURVIVAL UNDER THE RULE OF LAW* (1992); RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* (1998) [hereinafter ROBSON, *SAPPHO GOES TO LAW SCHOOL*].

<sup>596</sup> For an overview of the rule of law, see Berta E. Hernández-Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT'L L. 167 (2004).

would be anti-democratic. Indeed, it is the hallmark of democracy to provide protection on a nondiscriminatory basis to historically and traditionally discriminated against minorities—such as gays and lesbians.

Following, this work engages a critical interrogation of *Lawrence* beyond the factual context already analyzed. This discussion utilizes critical race, queer, feminist, and post-empire theory to elucidate the potential, the failings, and the power of *Lawrence*.

## 2. Privacy

The rich theoretical frameworks afforded by critical literature would have clarified the Court's privacy consideration. For example, the use of the spatial component of privacy so prominent in the decision results both in the "domestication of liberty"<sup>597</sup> and in the legitimization of the "yuk" factor.<sup>598</sup> Indeed, the vitriolic and public condemnation of and the backlash against *Lawrence* via *Goodridge v. Dep't of Public Health*<sup>599</sup>—which includes, for the first time in this nation's history, the proposal of a constitutional amendment to create a second-class citizenry vis-à-vis a fundamental right—suggest that the yuk factor is central to the *Lawrence* decision.

Moreover, as the transnational authority recognizes, there are certain spheres of privacy within families, but families exist and interact largely in public places—in parks, schools, places of worship, and workplaces. It would indeed be problematic if *Lawrence*'s emphasis on the spatial nature of liberty—private conduct in the home—were to result in a new public/private divide that unwittingly shoved gays and lesbians and their expression of family back into a closet. In this regard, *Lawrence* buys into two significant dimensions of privacy—the political and the sexual. It is politically private because we know nothing about the actors and because an apolitical state is viewed by majority society vis-à-vis minorities as a normative good. With respect to the latter, critical interrogations reveal that the normative standard is far from neutral and thus, always will favor the majoritarian goals which tend to be far from apolitical. Buying into this model, both *Lawrence* and *Garner* were presented as very private people, indeed apolitical, accidental, almost unwilling standard-bearers for their

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<sup>597</sup> Franke, *supra* note 441, at 1403–04 (citation omitted) (arguing that the invalidation of the law by protecting private spaces does not free gays and lesbians to “define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life” in the public sphere and thus is a very limited right).

<sup>598</sup> See Weinstein & DeMarco, *supra* note 512, at 457–58 (noting that the idea that homosexual sexual contact is immoral because it is “yuk” should be insufficient for rational basis of review).

<sup>599</sup> *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding, using *Lawrence*, that it is a denial of equal protection under the state constitution to deny same-sex couples the “fundamental right to marry”).

right to privacy. To be sure, although celebrated, they are more anonymous than known, more shadowy than private, more dependent than autonomous. As such they presented a stage that was conducive to the public/private split that the decision effects and that perpetuates the unspoken "yuk factor."

The *Lawrence* decision is also sexually private, a condition that, as reflected in the military don't ask-don't tell policy,<sup>600</sup> is also a normative good in the majority's imagination. Notably, the transnational authorities have rejected such sexual underground as an oppressive and chilling restriction on autonomy and dignity of the individual. However, the sexually private location of *Lawrence* is dangerously close to the bad privacy of the closet. If the decision means that only hidden gay (and lesbian) existence will obtain constitutional protection, gays' and lesbians' and their families' lives will continue to be rife with danger. Indeed, for gays and lesbians, the public/private borderlands are ill defined and doubtlessly precarious. For example, a lesbian family was broken up—a child was taken from a mother and custody awarded to a grandmother—because public characterization was accorded to acts that occurred within the privacy of the four walls of the home because they were witnessed by a family member.<sup>601</sup> Similarly, as Justice Scalia unabashedly and proudly declares, many "Americans"<sup>602</sup> want to and should be able to legitimately exclude gays and lesbians from their geography—both public and private: home, schools, work, places of worship, and street parades.

A critical interrogation shows that the relegation of gay or lesbian sexuality to the private sphere—a sphere that can quickly be rendered public by the presence of people who have been invited into that realm—creates the danger that there may be no private spaces within which to protect same-sex sexual expression. Such an outcome entrenches heteronormativity as the appropriate expression of desire in both the public and the private spheres with a resulting denial or condemnation of same-sex sexual activity and the erasure of nonheteronormative sexuality.<sup>603</sup> The danger in entrenching and naturalizing heteronormativity is that

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<sup>600</sup> LES ASPIN, SECRETARY OF DEFENSE, POLICY ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES (1993) (memorandum to the Secretaries of the Army, Navy, and Air Force, and to the Chairman of the Joint Chiefs of Staff).

<sup>601</sup> See *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), *rev'g*, 444 S.E.2d 276 (Va. Ct. App. 1994) (noting that kissing and patting in front of a toddler are inappropriate public displays of lesbian sexuality which resulted in a finding of unfitness to be a parent and a grant of custody to a grandmother away from a mother).

<sup>602</sup> *Lawrence v. Texas*, 539 U.S.558, 602 (2002) (Scalia, J., dissenting).

<sup>603</sup> See ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 595, at 124–25; see also JOANE NAGEL, RACE, ETHNICITY, AND SEXUALITY: INTIMATE INTERSECTIONS, FORBIDDEN FRONTIERS 49–50 (2003) (providing that "[h]eteronormativity refers to the assumption that everyone is heterosexual and the recognition that all social institutions (family, religion, economy, political system) are built around a heterosexual model of male/female social relations" and that critical interrogations have been "examining heterosexuality as a social

its “socially approved, ‘appropriate’ enactments of sexuality are perhaps the most embedded and enforced norms in human societies.”<sup>604</sup> A critical interrogation of the privacy rationale would have ensured that the yuk factor, the domesticating consequences, the closeting impacts, and the heteronormative assumptions of *Lawrence* not be part and parcel of its history or baggage.

Moreover, just like privacy should not be used as a sword to eviscerate full citizenship, autonomy, self-determination, dignity, and equality for gays and lesbians, neither should it be used as a shield to protect violence or violating conduct. Several cases depict the possible dangers of using privacy as a roadblock to prohibiting harmful conduct. For example, in *People v. Onofre*,<sup>605</sup> the New York Court of Appeals considered defendant Onofre’s challenge to his conviction on consensual sodomy on the grounds that it was an invasion of his constitutional right of privacy and denied him equal protection of the laws.<sup>606</sup> Onofre had admitted to engaging in sodomy with a seventeen-year-old male at his home. The court, relying on the *Griswold* line of cases, protected sexual decisions “voluntarily made by adults in a noncommercial, private setting.”<sup>607</sup> Emphasizing the distinction between “public and private morality,” the court concluded that sodomy statutes cannot be upheld based on public morality arguments. The court quickly rejected the state’s argument for the exercise of its police power in order to prevent harm because “[n]o substantial prospect of harm from consensual

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construction, questioning the universality and biological imbeddedness of heterosexual exclusivity, [and] inquiring into the origins of ‘compulsory heterosexuality’”) (citation omitted).

<sup>604</sup> NAGEL, *supra* note 603, at 50 (citation omitted). Similar to the construction of heteronormativity and heterosexuality, it is important to note that, as Foucault has argued “that homosexuality is necessarily a modern formation because, while there were previously same-sex acts, there was no corresponding category of identification.” JAGOSE, *supra* note 547, at 10 (citing MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. 1, *AN INTRODUCTION* (Robert Hurley trans. 1981)). This analysis locates the invention of the homosexual identity around 1870. *Id.* at 11 (noting that “Foucault’s argument is premised on his assertion that around 1870, and in various medical discourses, the notion of the homosexual as an identifiable type of person begins to emerge [and n]o longer [is] simply someone who participates in certain sexual acts, the homosexual begins to be defined fundamentally in terms of those very acts”); *see also id.* at 12 (noting that John D’Emilio, like Foucault, dates the emergence of the modern homosexuality identity to the late nineteenth century but, rather than base his analysis on a medicalization of homosexuality, he locates the emergence in the development of capitalism and focuses on the ways that families and households became a location for emotional rather than material support) (citing JOHN D’EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY* (1992)); *id.* at 13 (noting that “the formation of female homosexuality or lesbianism does not follow exactly the formation of male homosexuality[—]female homosexuality does not occupy the same historic positions as male homosexuality in the discourses of law or medicine”).

<sup>605</sup> *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980).

<sup>606</sup> *Id.* at 937–38 (considering “whether the provision of our State’s Penal Law that makes consensual sodomy a crime is violative of rights protected by the United States Constitution”).

<sup>607</sup> *Id.* at 940–41.

sodomy . . . has been shown.”<sup>608</sup> However, the conclusion ignores the underlying facts: what started the case was the report of the seventeen-year-old to the police that he had suffered physical injury because of the sexual contact.<sup>609</sup>

Similarly, in *Powell v. State*,<sup>610</sup> the Supreme Court of Georgia, based on state constitutional grounds, invalidated the state’s sodomy law<sup>611</sup>—the very same sodomy law that had been upheld by the U.S. Supreme Court in *Bowers*. In that case, Powell, who had admitted “at trial that he placed his mouth upon the genitalia of his wife’s niece,”<sup>612</sup> contended that “the statute criminalizing intimate sexual acts performed by adults in private and without force impermissibly infringes upon the right of privacy guaranteed all Georgia citizens by the Georgia Constitution.”<sup>613</sup> The court, asking “whether the constitutional right of privacy screens from governmental interference a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act,”<sup>614</sup> concluded that “it is clear that unforced sexual behavior conducted in private between adults” is protected conduct.<sup>615</sup> The court concluded that “[w]hile many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity.”<sup>616</sup>

Yet this decision again ignores the facts. As the dissent noted:

The prosecution against Powell certainly was not initiated because he was alleged to have engaged in a private and consensual act of sodomy. To the contrary, he was prosecuted only because the victim alleged that he committed an act of forcible sodomy against her. . . . Although the jury found Powell guilty of consensual sodomy, the fact nevertheless remains that the prosecution was initiated and pursued only because one of the participants initially alleged and subsequently testified under oath that she did not consent to the act of sodomy.<sup>617</sup>

With these added considerations, this again appears to be a case where the

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<sup>608</sup> *Id.* at 943.

<sup>609</sup> See Marc Spindelman, *Sodomy Politics in Lawrence v. Texas*, June 12, 2003, at <http://jurist.law.pitt.edu/forum/forumnew115.php> (last visited Nov. 10, 2004) (reporting that Evans, the 17-year-old, told the police “my anus was bothering me and I even at one point went to a doctor . . . and got treatment because my rearend was tore up”).

<sup>610</sup> *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

<sup>611</sup> *Id.* at 26.

<sup>612</sup> *Id.* at 20. (noting “niece’s testimony similarly describ[ed] appellant’s conduct”).

<sup>613</sup> *Id.* at 21.

<sup>614</sup> *Id.* at 23–24.

<sup>615</sup> *Id.* at 24.

<sup>616</sup> *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

<sup>617</sup> *Id.* at 29–30 (Carley, J., dissenting).

idea of privacy is deployed to shield undesirable conduct—an adult defendant's admitted sodomizing of his wife's niece who testified at trial that the acts were not consensual and who was a mere seventeen years of age.<sup>618</sup>

*State v. Eastwood*,<sup>619</sup> another Georgia case, relied on *Powell* to overturn a sodomy conviction<sup>620</sup> of a teacher for contact with a fifteen-year-old student.<sup>621</sup> At the pertinent time, Georgia law provided that a child under the age of fourteen legally could not give consent.<sup>622</sup> At first glance, this, too, appears to be a case where the shield of privacy allows socially undesirable results.<sup>623</sup>

Thus, a critical interrogation of *Lawrence*'s liberty/privacy approach reveals the possibility of unplanned and unforeseen consequences. One, the decision should not shove gays and lesbians back into the closet. Two, there should not be a redefinition of privacy that allows the state to reach into the home nor should associational "privacy" be deployed to marginalize, subordinate, or enable discrimination against gays and lesbians. Third, privacy should not be utilized to shelter violent and harmful conduct. Finally, *Lawrence* should not be the flagship that further entrenches heteronormativity.

### 3. Equality

Just as a privacy rationale needs to be critically interrogated, so does the equality rationale. Throughout the *Lawrence* opinion, Justice Kennedy compared homosexual sexual conduct to heterosexual sexual conduct, thus promoting the idea that the former is acceptable so long as it is mimetic of the latter. In his

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<sup>618</sup> See Spindelman, *supra* note 609.

<sup>619</sup> *State v. Eastwood*, 535 S.E.2d 246 (Ga. Ct. App. 2000).

<sup>620</sup> *Id.* at 248. The Georgia Court of Appeals held:

[N]othing in *Powell v. State* could be construed to create an exception whereby the acts of sodomy Eastwood engaged in with her student would remain criminal. . . . The Supreme Court clearly held that the right to privacy guaranteed to citizens by the Georgia Constitution was impermissibly infringed upon by the State's enactment [of statutes that] broadly criminalized private, unforced, noncommercial acts of sodomy between consenting persons legally able to give such consent.

*Id.* (citations omitted).

<sup>621</sup> *Id.* at 247. The facts in this case were that Eastwood, a high school teacher, engaged in "consensual sodomy with a student attending the school where Eastwood taught. The acts occurred in private between February 1, 1994, when the student was 15 years old, and April 28, 1995, when the student was 17 years old." *Id.*

<sup>622</sup> *Id.*

<sup>623</sup> However, it is noteworthy that the Court did acknowledge the state's ability to prohibit certain types of sexual conduct and impose limitations on the right to privacy by narrowly tailoring statutory proscriptions. *Id.* at 248. In this case, the teacher had pleaded guilty to violating a statute that proscribed sexual contact with a student by someone with supervisory or disciplinary authority. *Id.*

analysis, gays and lesbians, and their conduct, deserve constitutional protection only insofar as they perform and exist “just like” heterosexuals. Yet, this sameness model, particularly in light of social and legal structural heteronormativity, is flawed. It will result in the same incoherence that sameness feminism exhibited when it sought to utilize the women are “just like” men paradigm in matters of reproduction: discrimination on the basis of pregnancy is not sex-based discrimination because the “nonpregnant” category includes both men and women. Indeed, the concept of sameness imprinted in *Brown* and *Geduldig*,<sup>624</sup> as opposed to the antisubordination idea articulated in *Brown*, *Hernández*, and *Plyler*, has been deployed throughout history to perpetuate subordination. This concept of sameness has been used to deny women the right to own property,<sup>625</sup> to justify the concept of slavery,<sup>626</sup> to justify the disenfranchisement of all women and black men,<sup>627</sup> to determine labor and

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<sup>624</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974), *rev'g Aiello v. Hansen*, 359 F.Supp. 792 (N.D. Cal. 1973). Aiello challenged California's disability insurance program which exempted from coverage any work loss resulting from pregnancy. The Court held that the case was moot as to those persons who were entitled to benefits by virtue of program director's acquiescence in state decision limiting pregnancy exclusion to normal pregnancy, and that denial of benefits for work loss resulting from normal pregnancy did not violate the Equal Protection Clause.

<sup>625</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court noted:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . As a result . . . our statute books gradually became laden with gross, stereotyped distinctions between the sexes. . . . [M]arried women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

*Id.* at 684–85 (footnote and citations omitted).

<sup>626</sup> See, e.g., *Ewell v. Tidwell*, 20 Ark. 136, 144 (1859) (holding it impermissible for a free black to own a slave as the free black is “civilly and morally disqualified to extend protection, and exercise dominion over the slave”). The court observed:

Without attempting to discuss slavery in the abstract, it may be said that it has its foundation in an *inferiority of race*. There is a striking difference between the *black* and *white* man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other. For government and protection, the one race is dependent on the other. It is upon this principle alone, that slavery can be maintained as an institution.

*Id.*

<sup>627</sup> See, e.g., *Frontiero*, 411 U.S. at 685. The Court noted that “throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names. . . .” *Id.* In 1874, the Court held that suffrage was not coextensive with citizenship and that the Constitution had not added the right to suffrage to the privileges and immunities of citizenship: “For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. . . . If the law is wrong, it ought to be changed; but the power for that is not with

employment standards,<sup>628</sup> to justify separate schools for men and women,<sup>629</sup> to make criminal the conduct between homosexuals,<sup>630</sup> to deny dependent benefits,<sup>631</sup> and to deny pregnancy benefits,<sup>632</sup> to name a few. Thus, critical theory informs us that the antisubordination model is a much more effective vehicle than the sameness model to effect functional equality, to recognize full citizenship among all persons in society, and to obtain justice.

Like the privacy analysis, the sameness approach of *Lawrence*, along with its relational framework, does not suffice to protect sexual minorities from inequities. It limits protection of gays and lesbians only to those instances and contexts in which gays and lesbians can show that they are just like heterosexuals. Such an approach reinforces heteronormativity as the status quo, and both normalizes and perpetuates the destructive in/justice paradox.

On the other hand, the *Lawrence* decision provides support for the

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[the Court].” *Minor v. Happersett*, 88 U.S. 162, 177–78 (1874).

<sup>628</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that employer had to prove by a preponderance of the evidence that gender did not play a motivating/discriminatory part in a Title VII employment decision); *EEOC v. Sears*, 839 F.2d 302 (7th Cir. 1988) (finding no intent to discriminate based on company’s commitment to affirmative action, and there was no evidence that a leave-with-pay provision for male employees was discriminatory as EEOC failed to present sufficient evidence of its claims, its statistical analyses were misleading and flawed, it failed to provide individuals’ testimony to prove the discrimination, and it failed to adequately investigate factors other than gender for differences in positions and wages); *Riley v. Massachusetts*, 232 U.S. 671 (1914) (holding that statute requiring posting of women’s work hours and compliance therein was constitutional in light of its purpose of protecting women laborers and that statute’s requirement that all postings be approved did not violate Equal Protection Clause because the approval went to form rather than substance); see also *Alexander v. Louisiana*, 405 U.S. 625 (1972) (holding that although defendant was not entitled to a grand jury composed of members of his race, he was entitled to require that the State did not systematically deny members of his race to participate as jurors); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that statutes that gave mandatory preference to appointment of father over mother as administrator of deceased son’s estate because father was male unconstitutionally violated Equal Protection Clause).

<sup>629</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the State failed to satisfy its burden of providing an exceedingly persuasive justification for its sex-based admissions policy or that the policy was substantially related to the achievement of those objectives).

<sup>630</sup> See *Limon v. Kansas*, 539 U.S. 955 (2003); *Lawrence v. Texas*, 539 U.S. 558, 586 (2002) (Scalia, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2002); *Lofton v. Sec’y of Dep’t of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004).

<sup>631</sup> See, e.g., *Frontiero*, 411 U.S. at 677, 690–91 (holding statutory difference in treatment of male and female military personnel for determining dependent benefits involved the very kind of arbitrary legislative choice forbidden under the Constitution because it drew a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commanding dissimilar treatment for men and women who were similarly situated).

<sup>632</sup> See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974).



antisubordination idea. Justice Kennedy's assertion that "[t]he State cannot demean [the] existence or control [the] destiny [of gay people] by making their private sexual conduct a crime"<sup>633</sup> embraces and endorses the antisubordination precept. Similarly, Justice O'Connor's focus on the impropriety of seeking to "harm a politically unpopular group"<sup>634</sup> also advances the antisubordination paradigm by promoting the idea of and respect for full citizenship and dignity of all people.

That the sameness analytical framework can cause mischief in enabling equality has already become evident in four post-*Lawrence* cases that entrench and enforce heteronormativity. In *Lofton*,<sup>635</sup> gay men who were foster parents and legal guardians of children they wished to adopt challenged Florida adoption law that expressly proscribes adoption by homosexuals<sup>636</sup> on both equal protection and due process grounds.<sup>637</sup> In a decision that recalls *Fretté* and is unlike *Du Toit*, the Eleventh Circuit affirmed the district court's ruling for the government on both equal protection and due process challenges.<sup>638</sup> The Eleventh Circuit, embracing a distinction between conduct and identity that one would have thought *Lawrence* debunked, validated the statute noting that it addresses only people engaged in homosexual activity.<sup>639</sup> Much like in *Fretté*, the court observed that in Florida, "'adoption is not a right; it is a statutory privilege,'"<sup>640</sup> and that the state has a role to protect children who potentially may be adopted.<sup>641</sup> Distinguishing *Lawrence* by noting that "adoption law is unlike criminal law," the court focused on the best interests of the child and concluded that "the state can make classifications for adoption purposes that would be constitutionally suspect

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<sup>633</sup> *Lawrence*, 539 U.S. at 578.

<sup>634</sup> *Id.* at 580 (O'Connor, J., concurring).

<sup>635</sup> *Lofton*, 358 F.3d at 804.

<sup>636</sup> *Id.* at 806 (citing FLA. STAT. § 63.042(3) (2002)). Florida law forbids adoption but permits homosexuals to act as legal guardians and foster parents. *Id.* at 807–08.

<sup>637</sup> *Id.* at 809. The district court, in a pre-*Lawrence* decision, using a rational basis of review, found that the proscription of homosexual adoption was rationally related to the state interest of providing stable homes to children and having them in environments where they were not stigmatized as well as providing appropriate gender role models for the children. Similarly, the district court dismissed the due process argument finding that the perspective adoptive parents did not have a right to adopt the children. *Lofton v. Kearney*, 157 F.Supp. 2d 1372, 1382–85 (S.D. Fla. 2001).

<sup>638</sup> *Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d 804, 826–27 (11th Cir. 2004).

<sup>639</sup> See *id.* at 807 (noting that "[f]or purposes of this statute, Florida courts have defined the term 'homosexual' as being 'limited to applicants who are known to engage in current, voluntary homosexual activity'" (citation omitted)).

<sup>640</sup> *Id.* at 809 (citation omitted).

<sup>641</sup> *Id.* at 810.

in many other arenas.”<sup>642</sup> The court located the decision to adopt on the public side of the public/private divide, thus distinguishing private family matters from the decision to adopt. Because foster parenting is a short-term arrangement,<sup>643</sup> and the claimants could have “no justifiable expectation of permanency in their relationships,”<sup>644</sup> the court not only rejected the “appellants’ right-to-family-integrity argument,”<sup>645</sup> but also declined “to recognize a new fundamental right to family integrity for groups of individuals who have formed deeply loving and interdependent relationships.”<sup>646</sup> Because *Lawrence* did not establish a fundamental interest in sexual liberty,<sup>647</sup> the Eleventh Circuit, rather than take a holistic approach, refused to consider any links between the adoption prohibition and deprivation of liberty, thereby reinstating a conduct–identity divide.<sup>648</sup>

Citing to factual differences—*Lofton* involved minors and Florida’s law is not a criminal prohibition—the Eleventh Circuit ruled that *Lawrence* “cannot be extrapolated to create a right to adopt for homosexual persons.”<sup>649</sup> The court utilized rational basis review<sup>650</sup> and concluded that Florida has a legitimate

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<sup>642</sup> *Id.*

<sup>643</sup> *Id.* at 814 (concluding that “under Florida law neither a foster parent nor a legal guardian could have a justifiable expectation of a permanent relationship with his or her child free from state oversight or intervention,” and further noting that “[u]nder Florida law, foster care is designed to be a short-term arrangement”).

<sup>644</sup> *Lofton v. Sec’y of Dep’t of Children & Family Services*, 358 F.3d 804, 814 (11th Cir. 2004).

<sup>645</sup> *Id.* at 815.

<sup>646</sup> *Id.*

<sup>647</sup> *Id.* at 816 (citing *Lawrence v. Texas*, 539 U.S. 558, 586 (2002)) (Scalia, J., dissenting).

<sup>648</sup> *Id.* at 817 (not considering “whether exclusion from the statutory privilege of adoption because of appellants’ sexual conduct creates an impermissible burden on the exercise of their asserted right to private sexual intimacy”).

<sup>649</sup> *Id.*

<sup>650</sup> *Lofton v. Sec’y of Dep’t of Children & Family Services*, 358 F.3d 804, 818–19 (11th Cir. 2004). The court found that the best interests of children are served by

placing them in families with married mothers and fathers . . . [which] provide[s] the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling. Florida argues that disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida’s interest in promoting adoption by marital families.

*Id.* In addition, the court stated:

Florida also asserts that the statute is rationally related to its interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families. . . . Because of our conclusion that Florida’s interest in promoting married-couple adoption provides a rational

interest in placing children in homes where there is both a mother and a father.<sup>651</sup> Significantly, this so-called legitimate state interest is wholly unsupported by evidence in social theory and studies which show to the contrary.<sup>652</sup>

In light of social reality, *Lofton* is a paradigmatic example of the deployment of a heteronormative perspective. Without a critical perspective that unveils and eschews structural privileging of heterosexuality and the correlative abhorrence of homosexuality, supported by an antisubordination equality analysis, courts will narrowly read and construct *Lawrence*, and thereby frustrate goals for gay and lesbian equality.

Exactly seven months after its *Lofton* ruling the Eleventh Circuit decided *Williams v. Attorney General of Alabama*,<sup>653</sup> in which the ACLU challenged an Alabama statute<sup>654</sup> claiming it placed “a substantial and undue burden”<sup>655</sup> on Alabama citizens’ “fundamental rights of privacy and personal autonomy,” protected under several amendments to the United States Constitution.<sup>656</sup> Specifically, the ACLU claimed interference with citizens’ right to engage in certain lawful sexual practices, in particular the ability to obtain sex toys.<sup>657</sup>

The court, focusing on whether there existed a right to access to sex toys, concluded that no precedent establishes a broad “right to sexual privacy.”<sup>658</sup> This

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basis, it is unnecessary for us to resolve the question. We do note, however, the Supreme Court’s conclusion that there is not only a legitimate interest, but ‘a substantial government interest in protecting order and morality’ . . . .

*Id.* at 819 n.17 (citation omitted).

<sup>651</sup> *Id.* at 819. The court held:

Florida clearly has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children . . . . It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society—particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.

*Id.* (citation omitted).

<sup>652</sup> *See id.* at 820.

<sup>653</sup> *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004).

<sup>654</sup> Anti-Obscenity Enforcement Act, ALA. CODE §13A-12-200.2 (Supp. 2003) ((a)(1) It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value).

<sup>655</sup> *Williams*, 378 F.3d at 1235.

<sup>656</sup> *Id.* (“the First, Fourth, Fifth, Ninth and Fourteenth Amendments”).

<sup>657</sup> *Id.*

<sup>658</sup> *Williams*, 378 F.3d at 1235–36 (“The Court has been presented with repeated opportunities to identify a fundamental right to sexual privacy—and has invariably declined . . . . [T]he Court has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right.”) (citations omitted).

statement by the court is telling following on the heels of *Lawrence*, which applies the liberty right to privacy in order to overturn *Bowers*.<sup>659</sup> Nonetheless the *Williams* court, like the *Bowers* Court,<sup>660</sup> narrowly articulated the issue.

In *Williams*, the court asked if there existed an affirmative right to sex toys and proceeded to refuse to recognize such a new right. Ironically, the Eleventh Circuit then admonished the lower court for framing the right as broadly as one of the right to sexual privacy,<sup>661</sup> concluded that the proposed “new” right before the court failed the Glucksberg<sup>662</sup> test and, therefore, was subject to rational basis review.

Significantly, this was the second time the Eleventh Circuit held a hearing on the case.<sup>663</sup> The first time the case was before the court, relying on the now overturned *Bowers* case, it held that “[t]he Alabama statute making it a criminal offense to commercially distribute sexual devices in the State is rationally related to the State’s legitimate government interest in public morality.”<sup>664</sup> In this second remand, the Eleventh Circuit has again asked the district court to consider the statute’s validity in light of its ruling that the right at issue is not fundamental. If

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<sup>659</sup> *Lawrence*, 539 U.S. at 578 (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>660</sup> *Id.* at 566–67 “The Court began its substantive discussion in *Bowers* as follows: ‘[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.’” The Court went on further to say “[t]hat statement . . . discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward . . . .” Further, “[h]aving misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy . . . .” *Id.*

Ultimately, the Court in *Lawrence* articulated that the right at issue was “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” *Id.* at 564.

<sup>661</sup> *Williams*, 378 F.3d at 1239.

<sup>662</sup> *Id.*

First, in analyzing a request for recognition of a new fundamental rights, or extension of an existing one, we “must begin with a careful description of the asserted right.” Second, and most critically, we must determine whether this asserted right, carefully described, is one of “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”

*Id.* (citations omitted).

<sup>663</sup> See *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999), *rev’d*, 240 F.3d 944 (11th Cir. 2001), *remanded to* 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev’d sub nom.* *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004).

<sup>664</sup> *Williams*, 240 F.3d at 956.

the case goes back to the Eleventh Circuit, this opinion's language<sup>665</sup> suggests that the court may well uphold the law, disregarding *Lawrence's* finding of an individual's sphere of intimacy and an irrelevancy of morality<sup>666</sup> as a reason for interfering with same.

The other case that similarly ignored *Lawrence*, ruled contrary to the *L. and V.* and *S.L.* European cases, and imposed a heteronormative view of sexuality is *State v. Limon*.<sup>667</sup> In *Limon*, a teenage male received a seventeen-year sentence for having had consensual oral sex with a fourteen-year-old boy shortly after the former's eighteenth birthday.<sup>668</sup> The law made sodomy with a child under the age of sixteen a crime,<sup>669</sup> but contained a "Romeo and Juliet" exception allowing more lenient treatment if the conduct is between teenagers of the opposite sex, the older teenager is under nineteen, and the age difference is less than four years.<sup>670</sup> In *Limon*, had the younger child been of the opposite sex, the sentence would have been a maximum of fifteen months, rather than seventeen years.<sup>671</sup> Thus, after *Lawrence*, *Limon's* attorney anticipated that since the teenager had already served more than two years in prison, the court would allow his release.<sup>672</sup>

On reconsideration from the Supreme Court, *Limon* argued that the Kansas sodomy law with its Romeo and Juliet exception violated the Equal Protection Clause.<sup>673</sup> Notwithstanding *Lawrence*, the Kansas Appellate Court affirmed *Limon's* conviction, with the majority holding that sexual orientation classifications in the Kansas sodomy statutes have a rational basis, and thus pass constitutional muster.<sup>674</sup> The majority distinguished *Lawrence* on two grounds: one, like the *Lofton* court, noting that *Lawrence* did not involve children, and the State has a legitimate interest in protecting children, encouraging procreation, and

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<sup>665</sup> *Williams*, 378 F.3d at 1238 .8 ("There is nothing 'private' or 'consensual' about the advertising and sale of a dildo . . . . Moreover, the Supreme Court has noted on repeated occasions that laws can be based on moral judgments.").

<sup>666</sup> *Lawrence*, 539 U.S. at 577-78.

<sup>667</sup> *State v. Limon*, 83 P.3d 229, 232 (Kan. Ct. App. 2004). After *Lawrence*, the Supreme Court vacated (for reconsideration in light of *Lawrence*) the sodomy conviction of the Kansas teenager. *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002), *vacated by* 539 U.S. 955 (2003).

<sup>668</sup> See *Limon*, 539 U.S. at 955. See also American Civil Liberties Union, *Kansas v. Matthew Limon Case Background*, Dec. 1, 2003 (updated Aug. 10, 2004), at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=14476&c:41> [hereinafter *ACLU Case Background*].

<sup>669</sup> KAN. STAT. ANN. § 21-3505(a)(2) (2003).

<sup>670</sup> KAN. STAT. ANN. § 21-3522(a) (2003).

<sup>671</sup> *ACLU Case Background*, *supra* note 668.

<sup>672</sup> See Linda Greenhouse, *Justices Extend Decision on Gay Rights and Equality*, N.Y. TIMES, June 28, 2003, at A10.

<sup>673</sup> *Limon*, 83 P.3d at 232.

<sup>674</sup> *Id.* at 243.

preventing sexually transmitted diseases;<sup>675</sup> two, *Lawrence* was a due process case, while *Limon* involved an equal protection challenge.<sup>676</sup> Interestingly, the majority distinguished *Limon*<sup>677</sup> from *Romer*, noting that the latter involved classifications based on sexual orientation, while the Kansas statutory provisions focused on age of victim and perpetrator, as well as the nature of the act, not sexual orientation.<sup>678</sup>

The dissenter echoed the *Romer* and *Lawrence* majorities, concluding that the justifications for the Romeo and Juliet exception were nothing other than disapproval of homosexuality, which had been made an unacceptable ground for differentiation in *Lawrence*.<sup>679</sup> Moreover, the dissenter said “it [was] incomprehensible that this law has anything to do with encouraging marriage and procreation between the victim and the assailant, or anyone else.”<sup>680</sup>

The contrast between the majority and the dissent in *Limon* is telling. The majority blindly accepts and perpetuates heteropatriarchal norms and homophobic prejudices: children need to be protected from predatory gays, procreation is an exclusively heterosexual institution, gay sex has a monopoly on transmitting diseases. By contrast, the dissent gets it right by eschewing heteronormativity and looking at an antisubordination approach to equality jurisprudence.

Finally, *United States v. Marcum*<sup>681</sup> provides a glimpse of how *Lawrence* may be used in the military context. In *Marcum* the Appellant, a technical sergeant, was convicted of “non-forcible sodomy with a subordinate airman [Senior Airman Robert O. Harrison] within his chain of command.”<sup>682</sup> Such conduct violates Article 125, Uniform Code of Military Justice (UCMJ),<sup>683</sup> which unlike the *Lawrence* statute does not distinguish between heterosexual and homosexual sodomy.<sup>684</sup> The Appellant relied on *Lawrence* to challenge the constitutionality of Article 125.<sup>685</sup> He argued “that Article 125 suffers from the same constitutional deficiencies as the Texas statute in *Lawrence* because both statutes criminalize private consensual acts of sodomy between adults . . . [and]

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<sup>675</sup> See *id.* at 237.

<sup>676</sup> *Id.* at 241.

<sup>677</sup> *Limon*, 539 U.S. at 955.

<sup>678</sup> *Limon*, 83 P.3d at 239–40.

<sup>679</sup> *Id.* at 246 (Pierron, J., dissenting).

<sup>680</sup> *Id.* at 247 (Pierron, J., dissenting).

<sup>681</sup> *United States v. Marcum*, 60 M.J. 198 (Ct. Military App. 2004).

<sup>682</sup> *Id.* at 200.

<sup>683</sup> *Id.* at 201 (“Article 125 states: (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.”).

<sup>684</sup> *Id.* at 202.

<sup>685</sup> *Id.* (claiming that Article 125 is “either unconstitutional on its face or unconstitutional as applied to his conduct”).

that in light of the Supreme Court's rejection of *Bowers v. Hardwick*, Appellant's conviction violates the Due Process Clause."<sup>686</sup>

The *Marcum* Military Court noted that courts have differed in their interpretation of the *Lawrence* holding.<sup>687</sup> In its own reading, the Military Court while acknowledging that *Lawrence* requires a more "searching constitutional inquiry"<sup>688</sup> than the traditional "rational basis" test, concluded that *Lawrence* did not identify "the liberty interest as a fundamental right"<sup>689</sup> and, thus the proper analytical framework was the rational basis test.

The court examined Appellant's claim in an "as applied" context and not a "facial challenge" and developed a three prong test<sup>690</sup> as follows:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?<sup>691</sup> Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?<sup>692</sup> Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?<sup>693</sup>

The court easily concluded that the first prong of the test was met.<sup>694</sup> The second prong of the test is where the Appellant's claim failed: he was "the supervising noncommissioned officer . . . in a position of responsibility and command within his unit with respect to his fellow airmen."<sup>695</sup> Distinguishing the Appellant's relationship from the relationship of the parties in *Lawrence*, the court noted that the subordinate airman "was a person 'who might easily be coerced' or

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<sup>686</sup> *Id.* (citation omitted).

<sup>687</sup> *United States v. Marcum*, 60 M.J. 198, 204 (Ct. Military App. 2004) ("Indeed, in response to the Supreme Court's decision in *Lawrence*, some courts have applied the rational basis test standard of review while other courts have applied strict scrutiny.").

<sup>688</sup> *Id.* at 205.

<sup>689</sup> *Id.* ("In *Lawrence*, the Court did not expressly identify the liberty interest as a fundamental right. Therefore, we will not presume the existence of such a fundamental right in the military environment . . .").

<sup>690</sup> *Id.* at 206–07

<sup>691</sup> *Id.* ("[D]id appellant's conduct involve private, consensual sexual activity between adults?").

<sup>692</sup> *Id.* ("[D]id the conduct involve minors? Did it involve public conduct or prostitution? Did it involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.").

<sup>693</sup> *United States v. Marcum*, 60 M.J. 198, 206–07 (Ct. Military App. 2004)

<sup>694</sup> *Id.* ("This sodomy occurred off-base in Appellant's apartment and it occurred in private.")

<sup>695</sup> *Id.* at 208.

who was 'situated in [a] relationship[] where consent might not easily be refused.'<sup>696</sup>

Thus, Marcum, while ostensibly following *Lawrence*, found that in the military setting prohibited fraternization of service members with subordinates within their chain of command created a coercive situation that the *Lawrence* Court suggested could lead to a different result. Various questions remain unanswered after *Marcum*. One is whether the same analysis would be applied if rather than same sex actors, the proscribed conduct had taken place between heterosexuals. Given that Article 125 is gender neutral, it is likely that such a case would yield a similar outcome. However, two other scenarios—one with conduct taking place between same sex persons of the same rank and another with opposite sex persons of the same rank—might result in a divergent outcome if indeed homophobia is at the heart of the decision. A third set of facts involving a "person subject to" Article 125 and a civilian may be resolved differently if one such person engages in same sex sodomy and the other engages in heterosexual sodomy, particularly if it is with his/her spouse.

*Lofton*, *Williams*, *Limon*, and *Marcum*, along with *Onofre*, *Powell*, and *Eastwood*, vividly reveal the dangers inherent in avoiding critical interrogations of the cases. Age, race, class, and gender matter in law, as do constructions of zones of privacy. For equality to be a reality for all persons, the structural biases of law must be unpacked and rejected. Critical interrogations, utilizing a non- and anti-subordination paradigm, provide a framework for attaining these goals.

### C. *Empire*

This section engages in a cultural analysis of domination, which could have been blended together with the critical interrogations of the privacy and equality doctrines to reflect the shortcomings of *Lawrence*, because it is yet another component of an antisubordination paradigm. However, I engage it separately to highlight an important comparativistic thread.

With the exception of the South African decisions, the international, regional, and foreign decisions used in this work are from the North or the West. Thus, in this era of globalization, and in light of this overwhelmingly Northern and Western jurisprudence of liberation for gays and lesbians, it is important to examine whether the insistence on full dignitary and human rights for gays and lesbians universalizes a particularized North/West cultural phenomenon. In this light, it is necessary to explore whether asking for global equality for gays and lesbians effects a neo-colonial move, and whether efforts to universalize result in the imposition of hegemonic visions. In all cases, it is imperative that, even if (as I conclude) seeking global dignitary rights for all people does not effect such an imperial move, there be room for particularities that embrace cultural and national

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<sup>696</sup> *Id.* (citing *Lawrence v. Texas* 539 U.S. 558, 578 (2002)).



differences with respect to the idea and performance of homosexuality.

The danger in global discourses on same-sex desire is making the North/West position for homosexuality the point of reference.<sup>697</sup> One such referent in dominant discourses on homosexuality is existing terminology. It is thus important to engage the “narrative in which a premodern, prepolitical, non-Euro-American queerness must consciously assume the burdens of representing itself to itself and others as ‘gay’ in order to attain political consciousness, subjectivity, and global modernity.”<sup>698</sup> Moreover, the North/West labels for its constructed notion of homosexuality may not accurately reflect different cultural representations of same-sex desire or identity. Thus, any universalized methodological approach that insists on promoting full dignitary rights to all must also embrace a notion of a myriad and diverse particularized manifestations of same-sex cultural constructs.

That there are different ethnic, national, and cultural formations of same-sex desires neither naturalizes nor normalizes them, even within their own borderlands. For example, in contemporary Zimbabwe, Mugabe has deployed virulent homophobic policies and has conflated sexuality, race, and nation by suggesting that homosexuality is a white, western/northern evil which is “un-African.”<sup>699</sup> Similarly, in the East, the “Shiv Sena, a Hindu right-wing organization that forms the militant wing of the Hindu nationalist government currently in power [in India] . . . claim[ed] that lesbianism is an affront to Hinduism and ‘alien to Indian culture.’”<sup>700</sup> And in Egypt, the Mubarak government has arrested, tried, and convicted men for having sex with men in an attempt to show how Islamic society treats sexuality in general and same-sex sexuality in particular as contrasted to the morality of the West.<sup>701</sup>

Interestingly, in the South that exists within the North, similar nationalistic discourses take place. For example, African-American communities within the United States, supported often by the African-American churches, embrace theological positions on sexuality that identify gay and lesbian identities as part of

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<sup>697</sup> Roberto Strongman, *Syncretic Religion and Dissident Sexualities*, in QUEER GLOBALIZATIONS: CITIZENSHIP AND THE AFTERLIFE OF COLONIALISM 176, 178 (Arnaldo Cruz-Malavé & Martin F. Manalansan IV eds., 2002) [hereinafter QUEER GLOBALIZATIONS].

<sup>698</sup> Arnaldo Cruz-Malavé & Martin F. Manalansan IV, *Introduction: Dissident Sexualities/Alternative Globalisms*, in QUEER GLOBALIZATIONS 1, 5–6, *supra* note 697.

<sup>699</sup> KATHERINE FRANKE, SEXUAL TENSIONS OF POST-EMPIRE 8 (Columbia Law School Public Law and Legal Theory Working Paper Group, Working Paper No. 04-62, 2004) at <http://ssrn.com/abstract=491205>. See *id.* at 9 (noting parliamentary representation of “homosexuality and lesbianism” as “evil and iniquitous” and presenting “homosexuality . . . [as] completely alien to Zimbabwean culture”) (citation omitted).

<sup>700</sup> Gayatri Gopinath, *Local Sites/Global Contexts: The Transnational Trajectories of Deepa Mehta's Fire*, in QUEER GLOBALIZATIONS, *supra* note 697, at 149–50 (citation omitted).

<sup>701</sup> See Franke, *supra* note 699, at 19–22.

the white sickness.<sup>702</sup> Similarly, Latina/o communities within the United States often refer to homosexuality and lesbianism as a Northern disease.<sup>703</sup>

Significantly, regarding the notion of homosexuality as un-African (or un-whatever), “anthropological evidence reveals that there always have been forms of female homosexuality in Africa and in all other human cultures.”<sup>704</sup> Myths of the nonexistence of same-sex desire in different cultures can easily be debunked with anthropological studies. Thus, it is important in the critical project of obtaining dignitary rights and full citizenship for all people to realize not only that there are different manifestations, implications, and performances of these in varying cultures, but also that “the sexual ideologies of both heterosexuals and homosexuals contain similar racialized images and stereotypes of erotic others.”<sup>705</sup> Sexual myths, both heterosexual and homosexual, “are social constructions, arising out of historical conditions, power relations, and ongoing social processes.”<sup>706</sup>

In order to theorize same-sex desire in a holistic way, so as to ensure full citizenship and dignitary rights, it is imperative to recognize that cultural contexts are influenced by historical realities of power relations. Locations of power should not be deployed by cultural or national majorities, such as Mugabe in

<sup>702</sup> Beverly A. Greene, *Homophobic/Heterosexism in African Americans: Internalized Racism and African American Lesbians and Bisexual Women*, in MORAL IMPERIALISM 78, *supra* note 522, at 89.

<sup>703</sup> See, e.g., GLORIA ANZALDUA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987).

<sup>704</sup> Greene, *supra* note 702, at 89. Greene also observes that “Black women in the diaspora express what we would consider lesbian relationships.” *Id.* Moreover, Greene observes that, in cultures where there were same-sex interactions between women, they were not perceived negatively. *Id.*

<sup>705</sup> NAGEL, *supra* note 603, at 56 (noting specifically “the sexual anxieties of white men, the sexual submissiveness of Asian women, the sexual looseness of white women, the sexual potency of black men”); see also *id.* at 67 (noting that “early sexualized depictions of native peoples combined with those of later colonial and American chroniclers to form a general portrait of ‘Indian life’ as morally and culturally inferior to European and American societies”); *id.* at 67–68 (noting that records of Spanish soldiers and Franciscan friars commented about Pueblo peoples’ sexual practices as lewd and promiscuous and as including same-sex relations, “particularly among those whom some have labeled ‘berdache,’ ‘two-spirit,’ ‘man-woman’ or ‘third sex’ individuals”). Nagel also noted that European

fantasies of African feminine sexual exoticism and masculine sexual excess [were used] to justify the Europeans’ brutal treatment of both African women and men, especially their sexual violations of African women. The emphasis on African sexuality and savagery in the reports of all exclusively male Christian European travelers and explorers contributed to a growing and ingrained sexual ethnocentrism among Europeans.

*Id.* at 96.

<sup>706</sup> *Id.* at 54–55.

Zimbabwe, Mubarak in Egypt, the Shiv Sena in India, to name a few, to deny autonomy to sexual outsiders. Moreover, even within minority groups, nationalism and culture ought not to be used by those claiming to represent the community against sexual outsiders within the community.

Sexual minorities within majority groups and sexual minorities within minority communities have been colonized by those in power. Critical interrogations can unearth those locations of power to enable a holistic/pluralistic approach to rights. For example, with respect to native sexuality, one of the more common terms used to designate nonnormative sexual actors is *berdache*. Interestingly, this is a term “derived from a Persian word meaning ‘kept boy’ or ‘male prostitute’ and first applied by French explorers to designate ‘passive’ partners in homosexual relationships between Native American males. This is complicated, however, by the fact that many individuals labeled *berdaches* also engaged in cross-dressing and cross-gender behavior.”<sup>707</sup>

While it is not clear how the French came to use a Persian word to describe natives, what is depicted in the word’s usage is that the term *berdache* to refer to “homosexuals” is both under- and over-inclusive, as cross-dressing and cross-gender behavior need not reflect same-sex desire. This example shows that categorizations might not translate across cultural borders and thus universalisms might not be appropriate ways of addressing cultural particularities of desire. Black women in the diaspora may engage in what in the United States might be called a lesbian relationship, but the women in the diaspora might not give it that label.<sup>708</sup> Thus, in different locations, the common statement that “[t]here are not lesbians here” might simply mean that there is a different use of the terminology

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<sup>707</sup> Katie King, “*There Are No Lesbians Here*”: *Lesbianisms, Feminisms, and Global Gay Formations*, in *QUEER GLOBALIZATIONS*, *supra* note 697, at 36 (quoting Midnight Son, *Sex/Gender Systems in Native North America*, in *LIVING THE SPIRIT* 32, 34–35 (Will Roscoe ed., 1988)).

<sup>708</sup> Greene, *supra* note 704, at 89–90. Greene explains:

In Kenya Nandi women marry; in Lesotho there are Mummy-Baby relationships in which older women whose husbands are migrant mine workers take younger women as their spouses; in Lovedu, in the northern province of South Africa, Modjadji, “the Rain Queen,” a female hereditary leader keeps as many as 40 wives. In a number of West African regions from which slaves were brought to the “New World” Dahomey and Ashanti women who had sex with other women were not the target of negative sanctions and prohibitions. In the Dahomey, a woman could formally marry another woman and the children of one were considered the children of the other. In Suriname, lesbian relationships were tolerated as long as they were not named. A comparison of “lesbian relationships” among black women in the United States with those among black women in Suriname suggests that “*Mati*” (the Suriname Tongo name for women who have sex with women) display lesbian *behavior* and black lesbians in the United States view themselves as having a lesbian *identity*.

*Id.* (citations omitted).

or there are alternative ways of constructing identity.<sup>709</sup>

Similarly, a Latin American expert, while acknowledging the liberatory potential of the gay and lesbian movement in the North American region, insists that it is important to translate gender categories in ways that comport with local, culture-dependent contexts. He notes:

The rhetoric of the gay and lesbian human rights movement in the United States unites under the single category of "gay" such different sexual categories as an Indian *hijra* and a Mexican *joto*. . . .

. . . How is it possible to strive for the construction of more local gay, lesbian, queer Latin American identities when the very terms "gay," "lesbian," and "queer" have been manufactured elsewhere?<sup>710</sup>

Thus, while it is important to universalize the full citizenship and dignity of sexual minorities, it is equally important that the Northern terms and their implications, meanings, and performances not be universalized. Rather, culturally sensitive translations and acceptance of culturally particular performances that are nonheteronormative need to form the foundation of a nonsubordination ideal.<sup>711</sup>

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<sup>709</sup> See, e.g., King, *supra* note 707, at 37. King suggests that the term "lesbian"

may at other times actually be a local anticolonial liberation politics that refuses the narrow social institutionalizations of some particular cultural formation, under the term "lesbian," as inadequate to represent local practices, activisms, sexualities, or identities. The historical and fictive status of colonialism in the production of alternative sexualities or in the recognition or rejection of indigenous sexualities is various. Nevertheless, the insistence that homosexuality or lesbianism, even in its "globalized" versions, is an imposition of colonial rule can itself be repressive, as local lesbians document in *Unspoken Rules*, where they speak against their governments' claims that "There are no lesbians here."

*Id.* at 37 (quoting UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS (International Gay and Lesbian Human Right Commission ed. 1995)).

<sup>710</sup> Strongman, *supra* note 697, at 177. Interestingly, he also notes that notwithstanding the difficulty of the cultural translations he has underscored, usage of the terms gay, lesbian and queer in Latin America is quite prevalent, particularly "among the U.S.-influenced upper classes." *Id.*

<sup>711</sup> See Cindy Patton, *Stealth Bombers of Desire: The Globalization of 'Alterity' in Emerging Democracies*, in QUEER GLOBALIZATIONS, *supra* note 697, at 199. Patton provides that "[a]s avant-garde as queer politics in the United States imagines itself to be, it must stay anti-universalist. Other queers are not a local deviation from a Queer." *Id.* at 199. Patton further states:

Endocolonial or colonizing, depending on where they are, American gay activists who went abroad, however important their local activism, were not free from Historicist jingoism. Their direct actions were in the context of globalizing human rights. . . . The fact that there were different registers of globalization simultaneously had two effects: the tendency to view "native" sexualities as unproblematic until colonial regimes try to control them, and the belief that "native" sexualities are unarticulable and oppressed until liberationists arrive to help them speak.

Finally, a danger in universalizing terms and their meanings is that it will result in a reiteration of hegemony. This hegemonic imposition can occur even within borderlands so as to obliterate minority cultural expressions of same-sex desire. As one author has noted, "Latino[a] queer cultural productions in the U.S. occupy an 'inexistent' position for the white homosexual community and . . . the Latino[a] heterosexual community as well."<sup>712</sup> Moreover, there exists a

tendency to conflate Latino[a] and African American queer culture under the latter and thus homogenize racial and ethnic differences as a single, homogeneous difference. Thus, Latino[a] queer productions are also forced to become "homosexual with an ethnic touch" or Latino[a] and hence "nonhomosexual." . . . Latino[a] queer productions stress the fact that the global border is not simply a border between nations, between first and third worlds, but between sexualities. Latino[a] queer culture emphasizes that the global border is also constituted as a inner, "domestic" border. The border is not simply a geopolitical, economic, and racial divide, but also sexual.<sup>713</sup>

Latin America is an interesting location in which to look at the problems of exporting terminology without translations. Spanish colonialization brought to Latin American states a *machismo* culture which molds men as independent, strong, rational, authoritarian, dominant, and brave.<sup>714</sup> This construction of the real man results in a different interpretation of homosexuality. Once contextualized within the *machista* culture, homosexuality becomes constructed in terms of dominance and gender roles, not the partner's sex. Thus, men are broken up into the *pasivo* (passive) and *activo* (active) categories, with the *activo* being the one who penetrates during sex and who is not constructed as a "homosexual."<sup>715</sup> On the other hand, the man who is penetrated is the one

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*Id.* at 205–06. See also William L. Leap, "Strangers on a Train": Sexual Citizenship and the Politics of Public Transportation in Apartheid Cape Town, in *QUEER GLOBALIZATIONS*, *supra* note 697, at 222 (noting discomfort with the term gay in the South African context and providing example of *Moffie*, a reference to a "cross-dressing, effeminate South African man," as a term adopted and used that "maintain[s] connections to South African histories, cultures, and political traditions") (footnote omitted).

<sup>712</sup> Joseba Gabilondo, *Like Blood for Chocolate, Like Queers for Vampires: Border and Global Consumption in Rodríguez, Tarantino, Arau, Esquivel, and Troyano (Notes on Baroque, Camp, Kitsch, and Hybridization)*, in *QUEER GLOBALIZATIONS*, *supra* note 697, at 253 (citation omitted).

<sup>713</sup> *Id.* (citation omitted).

<sup>714</sup> See Berta E. Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 916 (1997); see also ANDREW REDING, *SEXUAL ORIENTATION AND HUMAN RIGHTS IN THE AMERICAS* 8 (World Policy Institute, Project for Global Democracy and Human Rights, 2003).

<sup>715</sup> See Anna Maria Alonso & Maria Teresa Koreck, *Silences: "Hispanics," AIDS, and Sexual Practices*, in *THE LESBIAN AND GAY STUDIES READER* 110, 115 (Henry Abelove et al. eds., 1993). See also REDING, *supra* note 714, at 8–9.

stigmatized and socially ridiculed for not comporting with the masculine role. These men, like women, lack power; indeed, they are referred to as effeminate.

Having cautioned against an imperial move, it is not to say that the liberatory messages of *Lawrence* and of the transnational jurisprudence should not be universalized within cultural particularities. Discrimination and violence against gay and lesbian people remain the norm, even in the North and the West, notwithstanding legal realities and paper protections to the contrary. Indeed, around the world, there are many locations that deny the existence of homosexuality and eschew it as against the cultural traditions and as Northern or Western.<sup>716</sup>

Although strides have been made globally toward equality for gays and lesbians, and although international, regional, and local laws often purport to prohibit discrimination, the reality for many sexual minorities is very different. For example, in China, there are no laws in place to provide any type of protection from discrimination, and there are significant restrictions on associations with gays and lesbians with nongovernmental organizations (NGOs) being required to get approval prior to being able to register.<sup>717</sup> Similarly, in Japan, there are enormous societal pressures to conform to heteronormativity, get married, and have children to carry on the family name.<sup>718</sup> In Stockholm, skinheads throwing stones and bottles attacked gay rights parade participants.<sup>719</sup>

In Latin America, the situation is no different. Reports from human rights campaigners speak of a variety of acts of harassment and violence toward gays and lesbians throughout the region. A World Policy Institute World Policy Report from the Project for Global Democracy and Human Rights on Sexual Orientation and Human Rights in the Americas recognizes that while there has been progress in some parts of the Americas, "the situation remains grim and often life-threatening in other parts."<sup>720</sup> The Report notes that in the Caribbean Jamaica is

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<sup>716</sup> See Dennis Altman, *On Global Queering*, AUSTRALIAN HUMANITIES REVIEW, July 1996, at <http://www.lib.latrobe.edu.au/AHR/archive/Issue-July-1996/altman.html> (last visited Nov. 10, 2004) (using examples of China and Iran as locations that represent homosexuality as an evil Western influence).

<sup>717</sup> Chinese Society for the Study of Sexual Minorities, *Gay Rights in China: An Update*, CSSSM NEWS DIGEST (Special Issue), Dec. 30, 2003, at <http://www.csssm.org/English/e9.htm> (last visited Nov. 10, 2004).

<sup>718</sup> See Scott Gordon, *Examining the Marginalization of Male Homosexuality*, THE DAILY YOMIURI TOKYO, March 2001, at <http://www.globalgayz.com/japan-news.html> (last visited Nov. 10, 2004); *UQ Helps Tackle Environmental and Social Challenges in the Philippines*, UQ NEWS ONLINE, Aug. 9, 2001, at <http://www.uq.edu.au/news/printpage.phtml?article=2307> (last visited Nov. 10, 2004).

<sup>719</sup> *Skinheads Attack Stockholm Gay Pride Parade*, REUTERS, Aug. 2, 2003, [http://action.web.ca/home/lgbt/databank.shtml?x=41569&AA\\_EX\\_Session=1437f292c71b475a935fe29f1cbc5e91](http://action.web.ca/home/lgbt/databank.shtml?x=41569&AA_EX_Session=1437f292c71b475a935fe29f1cbc5e91) (last visited Nov. 10, 2004); *Skinheads Hit Pride Parade*, CALGARY SUN (Alberta, Canada), Aug. 3, 2003, at 25.

<sup>720</sup> REDING, *supra* note 714, at 1 (noting that "sexual minorities in parts of Latin America

the most dangerous place, but that “draconian laws against sexual activity between members of the same sex” are still in effect not only in Jamaica but in the majority of the English-speaking Caribbean. In Central America, Nicaragua still criminalizes same-sex sex; in Guatemala and El Salvador, non-closeted gays are subject to violence; in Honduras, gay and transvestite sex workers are harassed, though neither homosexuality nor sex work is illegal. In South America, gay people are also at risk, even in Ecuador where a constitutional provision prohibits discrimination on the basis of sexual orientation. In Colombia, gays have been targeted for social cleansing; in Chile, notwithstanding the abolition of criminalization of same-sex contact, gays are harassed. In Brazil, Argentina, Mexico, and Venezuela, gays and lesbians remain at risk in smaller towns and rural areas, but they have achieved some level of progress in urban locations.<sup>721</sup> In Argentina, a transvestite died while in custody, allegedly due to torture.<sup>722</sup>

Stories abound throughout the world about the continued subordinate—indeed, at risk—status of people who are not identified with heteronormativity. Thus, while an imperial move in constructing nonnormative sexuality needs to be avoided, and thus even the use of terms such as homosexual, gay, and lesbian need to be interrogated, it is important that such sexual outsiders receive the protections and enjoy the privileges of full personhood. However, along with the universalization of full personhood, the particularization of cultural tropes and the various and varied expressions of same-sex desire need to be embraced.

## V. CONCLUSION

This Article explored the *Lawrence* decision, both in the context of international, regional, and foreign jurisprudence concerning same-sex performances, and in the context of critical theoretical frameworks. In the framework of non-U.S. jurisprudence, the United States can learn to take a more holistic approach to complex issues that do not necessarily fit within traditional boxes. Existing analytical methodologies and their normative constructs do not “fit” nontraditional claims. In that regard, the liberty analysis of Justice Kennedy, aside from being grounded in an enumerated constitutional right, realistically limits the due process and equal protection components of a claim with respect to

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and the Caribbean face country-wide discrimination, persecution, violence, and murder, often with acquiescence or indifference on the part of the authorities, and impunity for the perpetrators, who are in many instances the police themselves”).

<sup>721</sup> *Id.* at 1–2.

<sup>722</sup> *Argentina Transvestite Dies in Detention*, AMNESTY INTERNATIONAL, Apr. 25, 2000, AI Index: AMR 13/004/2000, at <http://web.amnesty.org/library/Index/engAMR130042000?OpenDocument&of=COUNTRIES%5CARGENTINA> (last visited Nov. 10, 2004); The International Gay and Lesbian Human Rights Commission, *Argentina: Torture of Transvestites Must Stop!*, Nov. 9, 2001, at <http://www.ntac.org/news/01/11/09ar.html> (last visited Nov. 10, 2004).

which identity (equality) is inextricably tied to conduct (liberty). This approach constructively reflects the transnational approaches that recognize the significance of both privacy and equality to such claims.

The *Lawrence* opinion completely lacks any examination or discussion of how intersectionalities of race, sex, gender, and class, to name a few, affect the liberty interest so laudably guarded. By looking at privacy and/or equality separately, the Court does not center on, although it recognizes, the significance of subordination. The Court's opinion thus fails to utilize the opportunity provided by *Lawrence* to focus on the real problem presented to it in the case—one of second-class citizenship. The Court could have taken this opportunity to articulate a clear constitutional standard by reiterating the antisubordination norms laid out in *Hernandez* and *Plyler* and suggested in *Brown* and *Romer*, concerning discrimination plainly targeted at particular groups based on societal, religious, political animosity. The *Lawrence* case presented to the Court a context in which it clearly could have articulated subordination as the geography that triggers some groups' legally deserved constitutional protection—subordination being established by the attitude of the community clearly provided here in the Texas brief. As the European, Canadian, and South Africa cases have shown, the Court could have said that Texas law violated the Constitution because it constituted systematic oppression.

*Lawrence* recognizes that in the case of gays and lesbians the “conduct” of same-sex intimacy is inextricably intertwined with gay and lesbian identity. Thus, the due process–equal protection dichotomy, with the former focusing on conduct and the latter focusing on people, is ill-equipped to address any situation in which, by their performance, the conduct and the identity are indivisible. Hence, the critique of the incoherence of the Court's opinion by some who seek to perpetuate the monocular, single-right approach is ill-placed. To be sure, the Court could have more clearly articulated that a dichotomous constitutional analysis was infeasible, as it would signify putting the proverbial square pegs in round holes. Nonetheless, far from incoherent, the *Lawrence* decision merely adopts a “living” constitutional interpretation that fits the legal problems confronted by the Court. Thus, the “tenability” of the equal protection argument signifies simply that a holistic approach considers both a due process and equal protection analysis that recognizes the indivisibility of gays' and lesbians' identities and conducts. Liberty and dignity easily translate into full personhood—a status only attainable if both conduct (fundamental right) and identity (equality of people) are acknowledged, protected, and respected.

Critical analysis, using a LatCritical approach that incorporates and embraces critical race, feminist, and queer theory, suggests that to eschew the heteronormativity imbued in culture and tradition, it is appropriate to use the antisubordination approach. Such an holistic approach is of utility for several reasons. First it permits the construction of the reality of a particular situation. Second, it avoids the dangers inherent in privacy—which can be used as a shield



behind which to hide to avoid personal responsibility for harm to the disempowered such as in *Onofre*, *Powell*, and *Eastwood*. Finally, it rejects a use of equality that requires sameness and thus entrenches and perpetuates the status quo of heteronormativity.

In conclusion, it is possible to be optimistic about *Lawrence*, because at its foundation it embraces the radical idea that gays and lesbians are people, too. It says that all people have the right to respect and dignity, not only people who are heteronormative. Globally, the idea has been embraced that in civil society—including families, workplaces, educational spaces, and even some religious institutions—even if same-sex contact is considered immoral or sinful, and it may be shocking, offensive, or disturbing to some, such reactions simply cannot be legal justification for the creation of a second-class citizenry.

In the end, it seems that it was unnecessary to make questionable claims that *Lawrence* is about relationships or love. Moreover, the erasures of race, class, age, gender, and sex from the existing narrative begged for the critical interrogation that this Article engaged in order to clarify the rule of law that emerges from this landmark decision. Race, class, age, gender, and sex issues, as well as their multiple intersections, cry out for interrogation of notions of power and privilege; for subordination and secrecy; dignity and dependency; equality and exclusion; autonomy and alienation; subjugation and empire. This critical evaluation allows a celebration of the decision and maps out a move forward in a pluralistic, accepting, antsubordination model.

